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V.

REPORTS OF CASES

ARGUED AND DETERMINED.

IN

The Court of King's Bench,

DURING

MICHAELMAS AND HILARY TERMS,

IN

THE SIXTH AND SEVENTH GEO. IV.

BY.

JAMES DOWLING, Esq. OF THE MIDDLE TEMPLE,

AND

ARCHER RYLAND, Esq. OF GRAY'S INN,

BARRISTERS AT LAW.

VOL. VII.

WITH AN INDEX,

AND

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Sir CHARLES WETHERELL, Knt. SOLICI-
TOR-GENERAL.

A

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

MICHAELMAS TERM,

IN THE SIXTH YEAR OF THE REIGN OF GEORGE IV.

WARRE v. MILLER, (in error), (a).

1825.

DECLARATION in assumpsit on a policy of insurance upon ship and freight, on the *Aurora*, at and from the island of *Grenada* to *London*, with leave to call at all or any of the *West India* islands, (*Jamaica* and *St. Domingo* excepted), warranted to sail from *Grenada* on or before the 1st day of *August*, 1823; and it was agreed, that it should be lawful for the said ship in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever or wheresoever, with liberty to load and unload goods wherever she might touch, without being deemed any deviation, and without prejudice to that insurance. Averment, that defendant subscribed the policy, and that the ship, to wit, on, &c., was in good safety at *Grenada*, and that divers goods and merchandizes were then and there loaded on board her, to be carried therein, on and

Where a vessel insured on freight at and from *Grenada* to *London*, arrived in safety and proceeded to deliver her outward cargo in different bays of the island, (where there is but one custom-house), and was lost in entering a bay to which she was going, for the double purpose of delivering the remainder of her outward, and taking in a homeward, cargo: Held, that this was not a deviation,

(a) Pursuant to the king's warrant, issued in *Trinity* term, by virtue of the statute 3 Geo. 4, c. 102, the judges of this Court sat at the *Guildhall, Westminster*, from the 31st *October* until the 5th *November*, inclusively.

tion, and that the underwriters were liable for the loss of the homeward freight.

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for freight on the said voyage; and the master of the said ship had then and there entered into certain contracts and agreements with divers persons, whereby they had contracted and agreed with him to load other goods on board the said ship, to be carried on freight on the said voyage; which last-mentioned goods were then and there ready to be loaded. Interest averred to be in the plaintiff, and loss of the ship by perils of the sea. Plea, non-assumpsit and issue thereon. At the trial, before *Park, J.*, in *C. P.*, at the *London* adjourned sittings after *Hilary* term, 1824, the facts proved in evidence were these:—The plaintiff was owner of the *Aurora*, and the defendant subscribed the policy in question on freight for 1500*l.* The ship sailed on her outward voyage under the command of the captain, on the 10th *December*, 1822, and arrived at *Grenada* on the 16th *January*, 1823, having taken out supplies for several estates in the island. She went first to *Grand Male Bay* in *Grenada*, and delivered a portion of her outward cargo there. After remaining at anchor 48 hours, she proceeded to *Duquesne's Bay*, in *Grenada*, and delivered another part of her outward cargo, and remained there three days. She next proceeded to *Irwin's Bay*, in *Grenada*, and arrived there about the 22d *January*, and delivered there part of the supplies for some estates in that neighbourhood. On the 3d *February*, she quitted *Irwin's Bay*, and proceeded towards *Grenville Bay* in *Grenada*, for the purpose of delivering the remaining part of the outward cargo, about one eighth, and to take in a part of her homeward cargo, but was lost by perils of the sea while going into *Grenville Bay*. There is only one custom-house in *Grenada*, for all the different bays. Before the captain sailed for *Grenville Bay*, he had made engagements with several persons for homeward cargo, amounting to very nearly a full cargo. Under these circumstances, it was argued on the part of the defendant below, that there had been a deviation from the voyage insured, and consequently, that the plaintiff could not

recover. The learned judge however over-ruled the objection, and directed the jury to find their verdict for the plaintiff, if they were satisfied that positive contracts for a homeward cargo had been made by the captain. The jury found that the ship, at the time of the loss, was going to *Grenville Bay*, for the double purpose of delivering the remaining part of her outward cargo, and to take in her homeward cargo, and a verdict was entered for the plaintiff. A bill of exceptions was then tendered upon the direction of the learned judge, which being sealed by him, a writ of error was thereupon brought, and common errors assigned.

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Taddy, Serjt., for the plaintiff in error. The question for the consideration of the Court is, whether the ship was within the risk insured by the policy at the time she was lost; which proposition may be divided into two: first, whether or not the risk had ever attached; and second, whether, if it had, there was a deviation from the voyage insured. It is to be observed, that this was a policy on the homeward voyage only. In the *West India* trade, policies are frequently executed on the outward and homeward voyages, and it was for the purpose of avoiding the difficulty here arising, that the policy was made "at and from *Grenada to London*, with leave to call at all or any of the *West India* islands." Before the policy attaches, it must be shewn that the vessel was employed solely upon a purpose connected with the voyage, at the time of the loss. [*Abbott*, C. J. How do you get at your first point? You did not desire the learned judge to direct the jury that the policy had not attached on the ship. The objection at the trial was, that upon the evidence, the ship had made a deviation from the voyage insured; which was admitting that but for that deviation, she was under the protection of the policy]. Certainly, the bill of exceptions is not sufficiently comprehensive to embrace the first point, and therefore the defendant must rely upon the

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second, namely, that there was a deviation from the voyage insured. Now in order to determine whether there has been a deviation, it is necessary to see, whether at the time of the loss, the ship was doing that which was connected solely with the voyage insured, and it lies upon the assured to shew that he was conducting himself in such a way as to be on that adventure. The case of *Solly v. Whitmore* (a), is a case directly in point, to shew that at the time of the loss, this ship was not engaged in a purpose connected with the voyage insured. That was a policy on the *Seamann*, "at and from *Hull*, to her port or ports of loading in the *Baltic Sea* and *Gulph of Finland*, with liberty for the ship in the said voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, for all purposes, particularly at *Elsinore*, without being deemed a deviation." The ship touched and stayed at *Elsinore* and *Dantzic*, to deliver goods, *Pillau* being her port of loading, and being lost in her voyage to *Pillau*, it was held that this was a deviation, inasmuch as the liberty to touch and stay at any ports or places, for all purposes, was confined to touching and staying for the sole purpose of the voyage insured. [*Bayley*, J. The vessel here had a double purpose in going to *Grenville Bay*, namely, to deliver part of her outward cargo, and get her homeward cargo.] But the sole object of this policy is to protect the homeward voyage. Now the vessel was not going to *Grenville Bay* for the sole purpose of getting a homeward cargo, or for a purpose solely connected with the homeward voyage. It does not necessarily follow that the liberty to touch and stay at any ports or places, and load and unload goods wherever she might touch, will cover the risk of pursuing a purpose not connected with the ultimate object of the voyage. It is not a fair and legitimate purpose, as connected with this view of the case, to deliver goods in the course of the outward voyage. [*Bayley*, J. How would you shape a home-

(a) 5 B. & A. 45.

ward policy under these circumstances; suppose a ship takes out a cargo for the purpose of delivering at two of the *West India* islands, meaning to take in her homeward cargo, partly at one island, and the rest at the other?] It is always competent to the parties to provide for a liberty which shall be sufficiently large. The case of *Inglis v. Vaur* (a) is expressly in point, to shew that the assured is not at liberty to mix up the double object of unloading the outward and taking in the inward cargo. Lord *Ellenborough* there said, "the captain had no right to mix up together the two objects, of disposing of the remnant of the outward cargo, and procuring a homeward cargo, at the risk of the underwriters in the outward voyage." There the policy was on the outward voyage only, and the vessel having sailed to one of the islands to which she was destined, was there lost while stopping partly to dispose of the residue of the outward cargo, and partly to obtain a homeward cargo, and it was held that the underwriters were not liable. The present case was decided at *Nisi Prius* on the authority of *Camden v. Cowley* (b), which was an action on a policy of insurance on ship at and from *Jamaica to London*, and the vessel was lost in coasting the island. But that case decides very little, and in many points it could not now be supported. In the first place it is not necessary, in the present case, to shew at what time the homeward bound risk commenced, and when the outward determined; for the one overleaps the other. In *Camden v. Cowley*, that was left as a question of fact for the jury, and not a question of construction on the policy, and there a special custom was found, and it was held that a policy at and from a foreign port commenced when the outward policy ended. In the present case, one point appears to be perfectly clear, namely, that if the captain had gone to *Grenville Bay* merely to deliver his outward cargo, and not to take in the homeward cargo, it would unquestionably be a deviation within the principle of *Solly*

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(a) 3 Camp. 437.

(b) 1 Sir W. Bl. 417.

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v. *Whitmore*, on account of the delay which would be thereby created. Then the question is, whether it makes any difference that he goes there for the double purpose of unloading and loading. If he stops to deliver an outward cargo as well as to take in a homeward one, the risk of the underwriters is increased by the additional delay occasioned by the unloading the outward cargo. In principle, therefore, it is the same as if he went there for the sole purpose of delivering the outward cargo, which would clearly be a deviation, and the ulterior object of taking in a homeward cargo, makes no difference. The authorities in the law of insurance are too strong the other way, to contend, with any success, that the risk here had not attached, (*Motteux v. The London Assurance Company* (a), *Chitty v. Selwyn* (b); but inasmuch as the ship here was not employed at the time of the loss, in a purpose solely connected with the homeward voyage, there was a deviation, and consequently the underwriters are not liable.

Campbell, contra. First, it is contended, that even if the ship had been going to *Grenville Bay* for the sole purpose of discharging the outward cargo, still she would be under the protection of the homeward policy; but, second, as she was going there for the purpose of taking in the homeward, and also of unloading part of the outward cargo, à fortiori, the policy attached. It does not appear that the homeward voyage was at all delayed, or the risk enhanced by so doing; at all events there was no deviation. Assuming that she was going to *Grenville Bay* for the sole purpose of unloading the outward cargo, still she would be under the protection of the policy, inasmuch as it is a policy "at and from *Grenada to London*," that is, from a foreign island to *Great Britain*. The effect of such a policy is, that it takes up the ship from the time she reaches the outward port, and there being once in safety, it protects her whilst legitimately pursuing the objects of

(a) 1 Atk. 545.

(b) 2 Atk. 359.

the adventure, until the return to her port of destination. It was proved that *Grenada* has but one custom-house, and therefore it is in law but one port. Going from one bay to another is consequently no more than going from one quay to another in the same harbour. Supposing then that she had entered a bay of *Grenada* for the purpose of unloading her outward cargo, and whilst there encountered a peril of the sea, and was lost, the underwriters would be still liable on the homeward risk. When a ship, which is expected to arrive at a certain place abroad, is insured "at and from" that place, or "from her arrival," there the risk begins from the first moment of her arrival at the place specified; and the words "first arrival" are implied, and always understood in policies so worded (a). The risk in such cases continues there, as long as the ship is preparing for the voyage insured; but if all thoughts of the voyage be afterwards laid aside, and the ship be suffered to lie there for a length of time, with the owner's privity, the insurer is not liable; for this would be to subject him to the whim and caprice of the owner, who might chuse to let the ship lie and rot there (b). It is clear therefore, the ship was under the protection of the homeward policy, from the very moment of her arrival in safety at the island of *Grenada*; and her going from bay to bay for the purpose of delivering portions of her outward cargo, makes no difference, because the whole island is to be considered as but one port. The case of *Camden v. Cowley* is an express authority to this point. There the policy was, "at and from *Jamaica* to *London*." The vessel arrived in safety in *Jamaica*, and was afterwards lost in coasting the island for the purpose of delivering parts of her outward cargo; yet the Court held, that the homeward policy attached. In that case, in order to shew where the homeward risk commenced, it was necessary to shew at what time the outward risk determined; and after an examination of

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(a) *Marshal's Ins.* 261. (b) *Motteux v. Lond. Ass.*, 1 Atk. 545.
Chitty v. Schoyn, 2 Id. 359. *Bird v. Appleton*, 8 T. R. 562.

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merchants, as to the custom, it was decided by a special jury, that the underwriters on the homeward policy were liable for the loss ; they being of opinion that the outward risk ended when the ship had moored 24 hours in any port of the island, and did not continue till she came to the last port of delivery. So in *Barrass v. London Assurance Company* (a), Lord Mansfield laid down the same doctrine to the jury, namely, that the outward risk upon the ship ended after her arrival in the first port of the island to which she was destined. As to the case of *Solly v. Whitmore*, it has a very slender application to this, for there the case was decided on the ground, that the ship went to *Elsinore* and *Dantzic*, not for any purpose connected with the homeward voyage, but solely for the purpose of delivering the outward cargo. In *Inglis v. Vaux*, the policy was on the outward voyage, and there is a marked distinction between an outward and a homeward voyage. The captain in that case remained at *Antigua* an unreasonable time, not to deliver his cargo, but to dispose of it, and to seek a homeward cargo, and not merely to take it on board. Here the vessel, having to deliver parts of her outward cargo in different bays, after delivering parts as quickly as possible, she is going to *Grenville Bay*, to deliver the remainder, and there take in her homeward cargo, which had been previously provided, and in so doing she is lost. It is true she was going there for a double purpose, but it is clear that she was going there for one legal object, namely, to take in her homeward freight ; and therefore it lies on the other side to shew that she did something inconsistent with the purposes of the voyage, and that the risk of the underwriters was increased. It is not to be presumed that the risk was necessarily increased by the going to unload at *Grenville Bay*. The onus lies on the underwriters to shew that the risk was thereby actually increased. None was here shewn : and therefore the policy having attached the moment the ship arrived at the

(a) Marsh Ins. 266, 2nd ed. Park Ins. 39, 4th ed.

island in safety, the ship was protected on the homeward risk. Those cases where a liberty is given to stay and trade during the course of a voyage are expressly in favour of this construction. In former times it was held, that if the ship stayed to trade in other ports, the underwriters were discharged; but in *Raine v. Bell* (a), *Cormack v. Gladstone* (b), *Laroche v. Oswin* (c), and *Urquhart v. Barnard* (d), it has been decided, that such trading does not avoid the policy, provided the voyage is not delayed so as to increase the underwriters' risk.

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Taddy, Serjt., in reply. If this case is decided against the plaintiff in error, it must be on the principle of begging the question as to the time when the outward voyage terminated, and the homeward commenced. That was entirely matter of evidence, and ought not to be inferred. The question, in effect is, whether the underwriters are to be at the risk of delivering the outward cargo all round the island. Here this vessel goes into two or three different bays, for no other purpose than to deliver parts of her outward cargo; and in going to *Grenville Bay*, for the double purpose of delivering the remainder, and taking in a homeward cargo, she is lost. Surely this comes expressly within the decision of *Inglis v. Vaux*. The cases of *Raine v. Bell*, *Laroche v. Oswin*, and *Cormack v. Gladstone*, are inapplicable, because in all of them there was a special finding, that no delay was occasioned by the stopping to trade. In the present case, the presumption was, that the homeward voyage would be delayed by going to deliver the remainder of the outward cargo at *Grenville Bay*; and the onus lies on the assured to shew, that no delay could have arisen. Relying on *Solly v. Whitmore*, and *Inglis v. Vaux*, as express authorities, it is submitted that the plaintiff in error is entitled to judgment.

(a) 9 East, 195.

(b) 11 Id. 347.

(c) 12 Id. 131.

(d) 1 Taunt. 150.

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ABBOTT, C. J.—I am of opinion, that the direction of the learned judge to the jury, in this case, was perfectly right. The policy is upon ship and freight at and from *Grenada to London*, with leave to call at all or any of the *West India* islands, *Jamaica* and *St. Domingo* excepted; and it was agreed, that it should be lawful for the ship, in that voyage, to proceed and sail to, and to touch and stay at any ports or places whatsoever and wheresoever, and without being deemed any deviation, and without prejudice to that insurance. The single point arising on the bill of exceptions is, whether there was not a deviation from the voyage insured, that voyage being “*at and from Grenada to London.*” It may be conceded, that the words, “*at and from Grenada,*” will not include *all* purposes for which the vessel may be staying there, but they will certainly include all purposes which, according to the mode of carrying on commerce in that place, are preparatory to the commencement of the homeward voyage. That being so, it must be taken, that at the time of this loss, the ship was within the protection of the policy,—the policy having attached within 24 hours after her being in safety at *Grenada*. The only ground for saying that she was out of the protection of the policy at that time is, that the employment in which she was actually engaged, was foreign to the purposes of the voyage insured. The island of *Grenada*, it seems, has several bays, and one custom-house only; but whether it has any port, properly so called, does not appear. Observing the situation of this island, and knowing from other circumstances, that vessels going from this country to *Grenada*, to bring home colonial produce, carry out supplies to the estates situated in different parts of the island, and bring home from different estates, different parts of their return cargo, I own it appears to me, (as was very well put in argument), that the island of *Grenada* must be considered as *one port*. As it is to be so considered, then, inasmuch as it

is necessary that the outward cargo should be delivered before the homeward could be taken on board, it seems to me that the delivery of the outward cargo is a requisite preparation for the voyage home, for which the ship is insured. The ship being insured *at*, as well as *from Grenada*, I think she was not employed at the time of the loss; in a purpose unconnected with the policy, and that that employment does not deprive her of the protection of the policy. Going to *Grenville Bay*, was a necessary, and not a foreign step, preparatory to the adventure which the underwriter took upon himself to insure. On these grounds, I am of opinion, that the judgment of the Court below must be affirmed.

BAYLEY, J.—I am of the same opinion. It was assumed at the trial, and not then denied, that at the time of the loss the policy had attached, and the only point on which the bill of exceptions was tendered, was, whether the underwriters' liability was or was not discharged by a deviation. There is no doubt that the policy attached as soon as the ship had arrived in safety 24 hours, and whilst the ship was at *Grenada*, for the purpose of bringing a cargo home, a loss happens by perils of the sea. Now, according to the ordinary mode of intercourse with the *West India* islands, stores are carried out to the different estates from which the return-cargo is received. In the natural course of things, the stores outward are delivered at different ports or bays nearest to the estates where they are wanted, and the return is received, in like manner, from different bays, and not all at one port; and it is not until the delivery of the outward cargo is completed, that the return cargo can be received. Here the ship, having been at three different bays, to deliver parts of her outward cargo, was going to *Grenville Bay*, to deliver the remainder, which was then on board, and in doing so, the loss happened. It is said, that this was a deviation under

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the general words of the policy, because the purpose for which she went to *Grenville Bay* was not a purpose connected with the homeward voyage. Now it seems to me, that from the nature of things, this was a purpose necessarily connected with a voyage of this description; for if the outward cargo of a *West India* ship is deliverable at different places in the same island, and the homeward cargo cannot be taken in until the whole is delivered, it must be expected that after she has delivered portions at some places, she will be in progress, in order to deliver the remainder at others, and consequently engaged in a purpose connected with her homeward-bound voyage. The case of *Solly v. Whitmore*, as it appears to me, is perfectly distinguishable from this. There the purpose for which the ship went to *Elsinore* and *Dantzic*, was foreign from the purpose of the voyage insured. The ship was insured from *Hull* to her loading port, which was *Pillau*, and as she did not go to *Elsinore* and *Dantzic*, for a purpose connected with the voyage, the Court considered that a deviation. The case of *Inglis v. Vaux*, is also different from this. That was an insurance at and from *Liverpool* to *Martinique*, and all or any of the *Windward* and *Leeward* islands, with liberty to touch at any ports or places whatsoever, to take on board and land goods, stores, &c. The ship sailed from *Liverpool*, on 13th *March*, 1811, and arrived at *Martinique* about the 20th *May* following. There the captain disposed of all his outward cargo, except a small quantity of lime and bricks. With these he sailed for *Antigua*, where he arrived on the 31st of the same month. Here the ship lay till the 8th of *July*, when she was wrecked in a hurricane, with the lime and bricks still on board. The captain had not been able in the mean while to obtain a freight home, and he stated in his examination, that he stopped at *Antigua*, partly to dispose of the outward cargo, and partly to procure a homeward cargo; and it was very properly held, that under such circumstances

the underwriters were not liable. There are two cases on the same risk, of *Forbes v. Cowie* (a), and *Forbes v. Aspinell* (b), which seem to me to have some bearing on the present case; and if the objection taken here were good and valid, it might have been so there. They were actions on a policy of an insurance on the freight of the ship *Chiswick*, and from any port or ports of *Hayti* to *Liverpool*. After unloading part of the outward cargo, and taking in a portion of the homeward cargo at one port, the ship proceeded to another, in the same island, to discharge the remainder of the outward cargo, but before that purpose could be effected, the vessel was lost by perils of the sea. The only question made was, as to the amount of the damages which the assured was entitled to receive. It might be said, that here was a deviation; but, after a very learned argument upon the case, that objection was never taken, which would have been conclusive, if it could be said, that going to the other port was a deviation. In principle, those were similar cases to the present. I am, however, of opinion, that upon a voyage of this description, where the outward cargo must naturally be delivered in different places in the same island, and the homeward cargo must be taken in in different places also, going from place to place to deliver the outward cargo, and taking in the homeward, is no deviation, and therefore that the direction of the learned judge was, in this case, perfectly correct.

HOLROYD, J.—I am also of the same opinion. The risk had begun to take effect as soon as the vessel had been 24 hours in safety at *Grenada*; and inasmuch as the going to *Grenville Bay* was for a purpose connected with the homeward voyage, I think there was no deviation.

LITLEDALE, J., concurred.

Judgment affirmed.

(a) 1 Campb. 520.

(b) 13 East, 323.

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PRICE v. SEAMAN, (in error).

Declaration, in assumpsit, that plaintiff had bargained with *A. B.* for the purchase of freehold houses; that defendant, in consideration that plaintiff would give up the bargain to him, (defendant), and permit him to become the purchaser of the houses, promised to pay 40*l.*; that plaintiff did give up the bargain to defendant, and permit him to become the purchaser; that defendant did become the purchaser, and take the bargain, and obtain a conveyance of the houses from *A. B.*, on the terms aforesaid; but that defendant would not pay the 40*l.*: held, first, that it must be presumed, after verdict for the plaintiff, that the bargain between him and *A. B.* was in writing; and, second, that the assignment of that bargain to the defendant was a good consideration to support assumpsit.

WRIT of error from the Common Pleas. Declaration in assumpsit on a special agreement. First count, that plaintiff below, before the making of the promise of defendant below, had bargained and agreed with one *A. B.* for the purchase, by plaintiff, of three freehold houses, of and from the said *A. B.*, to be conveyed to plaintiff, at the price of 600*l.*; that defendant was desirous of obtaining the said bargain, and becoming the purchaser of the said houses, instead of plaintiff, and thereupon, in consideration that plaintiff, at the request of defendant, would sell and give up to defendant the said bargain, and would suffer and permit defendant to become the purchaser of the said houses from the said *A. B.*, instead of plaintiff, defendant promised to pay plaintiff 40*l.*; that plaintiff, confiding in that promise, did sell and give up the bargain to defendant, and did suffer and permit him to become the purchaser of the houses from the said *A. B.*, instead of plaintiff, and defendant accordingly did become the purchaser, and did take the said bargain, and obtain a conveyance to defendant of the said houses, on the terms aforesaid. Breach, non-payment of the 40*l.* There were other special counts, but the question turning entirely upon the first, it is unnecessary to set out the rest. Plea, non-assumpsit, and issue thereon. The jury found a verdict for the plaintiff generally, and judgment thereon was entered up generally in the Court below (*a*). Assignment of errors, that the contract set out as the consideration for the promise in the first count, was a contract or agreement respecting the sale of land, but was not stated to be in writing; that no sufficient consideration for the contract

(*a*) 2 Bing. 437.

was stated; and that the contract was a mere chose in action and not assignable.

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Barstow, for the plaintiff in error. A general judgment has been entered up for the plaintiff in the Court below; therefore, if either of the counts of the declaration is bad, that judgment must be reversed. Now, the first count is clearly bad, for it sets forth no sufficient consideration for the promise. The consideration there alleged, is the sale of a bargain and agreement made between the plaintiff below, and one *A. B.*, for the purchase of certain houses; but that bargain and agreement is not stated to be in writing, and unless it was in writing it would not be binding upon *A. B.*, and if not, it was in fact no consideration at all. This is not like an action upon a guaranty, in which it is not necessary to state that the guaranty was in writing, but that is, because the guaranty is no part of the consideration; yet, even in that case, it is necessary to state, as well as to prove a sufficient consideration, the basis of which would be the debt or engagement guaranteed. Here, as there was no writing, there could be no basis for any consideration. The Court cannot, even after verdict, presume that the contract was in writing; but even if they could, it was a mere chose in action, not assignable, and not competent to form a consideration for a promise.

Talfourd, contra. The consideration stated in the first count is good, upon several authorities. In *Mouldsdale v. Birchall* (a), it was held that the assignment of an uncertain debt, was a good consideration for a promise. In *Thorp v. Thorp* (b) it was held that the release of an equity of redemption was a good consideration (c), and the Court said, that the common law would take notice that the mortgagor had an equity to be relieved in Chancery; so here, the Court will presume, after verdict, that the agree-

(a) 2 Sir W. Bl. 820.

(b) 1 Ld. Raym. 662.

(c) Sed vide, *Preston v. Christmas*, 2 Wills. 86.

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ment for the houses was in writing, and will take notice that the plaintiff, below, had an interest which he might have enforced in equity. In *Davis v. Rayney* (a), it was held that the forbearing to sue an executor for a legacy was a good consideration for a promise to pay it, although it did not appear affirmatively that the executor had assets in his hands. Upon these authorities it is submitted that this declaration is good, and that the judgment entered up for the plaintiff ought to be affirmed.

ABBOTT, C. J.—I think the judgment of the Court of Common Pleas ought to be affirmed. The plaintiff has alleged in his declaration that he had bargained and agreed with one *A. B.* for the purchase of certain freehold houses. We must understand him thereby to mean that he had made a valid bargain, and as a writing is necessary to render such a bargain valid, we must, after verdict, presume that it was in writing. The plaintiff further alleges, that in consideration that he would sell and give up that bargain to the defendant, and would suffer and permit him to become the purchaser, the defendant promised to pay him a sum of money, adding, that he did sell and give up the bargain to the defendant, &c. If a writing was necessary to make that transfer valid, it must now be presumed. The concluding allegation is, that the defendant became the purchaser, and took the bargain, and obtained a conveyance of the houses. The plaintiff, therefore, had made a contract, which he gave up to the defendant, and unless we can say that giving up a contract in consideration of money is illegal, I cannot see any objection to the plaintiff recovering in this action. I am not aware of any rule of law which forbids the giving up of a contract in consideration of money, consequently, I am of opinion, that the plaintiff is entitled to recover, and that the judgment given in his favour must be affirmed.

(a) 2 Leyinz. 3.

BAYLEY, J.—We must presume that the bargain and agreement mentioned in the declaration was an effectual bargain and agreement, which it could not be unless it was in writing. I at first doubted whether the objection, that the consideration stated for the defendant's promise was the assignment of a chose in action, was not a fatal objection, but I am now satisfied that it is not. Such an assignment is not illegal, although the assignee cannot sue upon the contract in his own name. Debts are frequently assigned for the benefit of creditors; and the custom is perfectly legal: the only restriction is, that the assignee cannot sue for them in his own name, but must declare in the name of the assignor.

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HOLROYD, J.—For the reasons already mentioned, I am also of opinion that the first count is good. The assignment of a chose in action is not illegal, for else the assignee could not sue upon the contract even in the name of the assignor: and *Comyn's Digest* (a), and the case of *Loder v. Cheslyn* (b), are authorities to shew that the assignment of a chose in action is a good consideration for a promise.

LITLEDALE, J.—I am of the same opinion.

Judgment affirmed.

(a) Com. Dig. Action upon the Case upon Assumpsit (B 83).

(b) 1 Sid. 212.

HILL v. SAUNDERS (in error) (a).


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WRIT of error from the Common Pleas. The declaration, which was in covenant, stated, that by an indenture

Covenant for non-payment of rent. Declaration, that plaintiff and his wife, since

(a) Vide 2 Bing. 112.


deceased, demised the premises to defendant, for 21 years, reddendum, and covenant to pay rent to plaintiff and his wife; that the wife died, and that afterwards rent became due to plaintiff. Plea, setting out the lease on oyer, by which it appeared that the

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made between plaintiff, and *Nancy* his wife, since deceased, of the one part, and defendant of the other part; plaintiff, and the said *Nancy*, did demise and lease to defendant, certain premises, to hold for 21 years, from 2d *February*, 1816, yielding and paying to plaintiff, and the said *Nancy*, the yearly rent of 24*l.*; that defendant thereby covenanted to pay the said rent to plaintiff and the said *Nancy*; and, that, by virtue of the said demise, defendant entered, and afterwards and during the term, and after the decease of the said *Nancy*, to wit, on, &c., 24*l.* for one year's rent, became due to plaintiff. Defendant craved oyer of the indenture, by which it appeared, that the reddendum in the lease was to plaintiff and *Nancy* his wife, *her heirs or assigns*; and that the covenant to pay rent was with plaintiff, and *Nancy* his wife, *her heirs and assigns*, to pay to plaintiff, and *Nancy* his wife, *her heirs and assigns*. Pleas:—First, non est factum. Second, that plaintiff and his wife, before and at the time of making the indenture, were seised in their demesne as of fee, in right of the wife only, of the premises; and that plaintiff then had not any estate in the premises, except in right of his wife; and that the wife, after the making of the indenture, and before any part of the said 24*l.* in the declaration mentioned became due, to wit, on, &c., died, without issue, so seised, leaving one *A. B.*, her brother and heir at law; whereupon all the estate which plaintiff had in the premises expired, and the said *A. B.* became seised, and being so seised, afterwards, to wit, on, &c., entered, and ejected defendant. Third, that plaintiff never had any estate in the premises, except in right of his wife, whose estate the said parcels of land, &c., in the declaration mentioned were; and that the

reddendum, and the covenant to pay rent, was to plaintiff and his wife, *and her heirs*; and stating, that plaintiff never had any estate in the premises, except in right of his wife, whose estate they were; that she died, without issue, leaving an heir, whereupon all the estate of plaintiff ceased; and that the heir threatened to enter and eject defendant, unless he attorned; and defendant was thereby compelled to attorn, and become tenant to the heir. Upon general demurrer: Held, that this plea was good, and an answer to the action.

wife, after the making of the indenture, and before any part of the 24^l. became due, to wit, on, &c., died without issue, leaving *A. B.*, her brother and heir at law; whereupon, all the estate which plaintiff ever had in the premises altogether expired, ceased and determined, nor hath he from thence hitherto had, nor has he now, any estate therein: and the said *A. B.*, as such heir as aforesaid, afterwards, to wit, on, &c., threatened defendant to eject him from the possession of the premises, unless he would attorn and become tenant; and defendant was then forced and obliged to, and did, necessarily attorn, and become tenant thereof to the said *A. B.* Demurrer to the pleas, and joinder in demurrer. Judgment for the defendant on the demurrer in the court below. Assignment of general errors.

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W. E. Taunton, for the plaintiff in error. The judgment of the Court below, was founded upon the third plea; the only question for this Court, therefore, is, as to the validity of that plea: for it must be admitted, that if that plea is bad, it cannot be aided by the others. Now, the third plea is clearly bad, for it contains no traversable allegation; it is impossible to take any material issue upon it. Assuming that it contains an allegation that the wife had some estate, still, non sequitur that it was an estate of inheritance, which passed, at her death, to her heir at law; and it was impossible for the plaintiff to traverse that. [*Holroyd, J.* The third plea shews, inferentially at least, that the wife had such an estate as determined at her death; and though that might have been insufficient on special demurrer, it is admitted by the general demurrer. *Bayley, J.* And if it appears that the wife had an estate determinable by her death, I apprehend the husband cannot sue for rent accrued subsequent to her death]. It is submitted that he can; he is a mere stranger, as regards the lease; the lessee is in by right of the wife, and the husband is joined merely for conformity, *Harvy v.*

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Thomas (a); consequently, the lease operates by way of estoppel, and the lessee is still liable for the rent. Undoubtedly, a husband, seised in right of his wife, has an interest in the land, *Blake v. Foster (b)*, but it is a defeasible interest only; 1 *Ventris*, 358, where it was said by *Pemberton*, C. J., "The difference is, where the party that makes the estate has a legal estate, and where a defeasible estate only; for in the latter case, a lease may work by estoppel, though an interest passed so long as the estate out of which the lease was derived remained undefeated." [*Bayley*, J. The breach is not well assigned, for it does not pursue the words of the covenant; the covenant is to pay to the plaintiff and his wife, *her heirs and assigns*, and there is no allegation negating a payment, in those words]. There is an allegation generally, that the rent remains wholly unpaid, and that is sufficient. *Dixon v. Harrison (c)*, is an authority in favour of the plaintiff. It is there said, "To this purpose there is a case: if a man be seised of land *jure uxoris*, and leaseth the land for years, reserving rent, his wife dies without having had any issue by him, whereby he is no tenant by the courtesy, but his estate is determined; yet he may avow for the rent before the heir hath made his actual entry. This case is not adjudged, but it is much the better opinion of the book." *The Year-book*, 9 *Hen.* 6, f. 43, is then cited. A similar case is also cited in *Brook's Abridgment (d)*. [*Bailey*, J. That can only mean, the rent accrued during the life of the wife]. It is submitted, that it must mean rent accrued after the death of the wife, for this reason, that at common law, the husband could not distrain for rent after the estate out of which the rent arose had determined. [*Littledale*, J. The form of the declaration is fatal to the plaintiff. The covenant in the lease is, to pay rent to him and his wife, and her heirs and assigns; that


(a) Cro. Eliz. 216.

(b) 8 T. R. 487.

(c) Vaughan, 46.

(d) Avowry. Pl. 123.

shews that the plaintiff's interest ceased at the death of his wife: the declaration alleges that the wife was dead when the rent became due; that shews that the plaintiff has no right of action. This is, in fact, an action to recover rent belonging to the heirs of the wife, and what interest can the plaintiff have in that?] If the issue to be tried were, whether the estate was the wife's, or not, this covenant would be strong evidence to go to the jury in the affirmative; but it cannot decide the issue on this record; it only raises an inference: it still leaves it doubtful whether the whole estate was the wife's, and then the husband is entitled to sue, as the survivor of two joint covenantees. *Anderson v. Martindale (a)*. The decision of the Court below, supports the present argument. It proceeded upon two facts, both of which were assumed to exist, but neither of which existed in fact, and neither of which appears on the record; namely, first, that the wife was seised in fee; and, second, that the lease was a valid lease, within the statute 32 Hen. 8, c. 28. Now the third plea does not allege, that the wife was seised in fee; but assuming that she was, non sequitur that the lease is good, because it does not appear that the land had been accustomedly letten for twenty years prior to the lease, nor that the accustomed rent had been reserved.

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E. Lawes, contra, was stopped by the Court.

ABBOTT, C. J.—I think the judgment of the court of Common Pleas ought to be affirmed, for it seems to me to be the only right judgment. The action is covenant for the non-payment of rent. The declaration alleges that the plaintiff and his wife *demised*. The plaintiff, therefore, has taken upon himself to set forth the legal effect of the indenture, and as against him it must be taken that his wife had some interest in the premises. The declaration then sets out the reddendum and the covenant to pay rent,

(a) 1 East, 497.


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but it does it incorrectly, and the defendant, therefore, sets out the whole of the indenture upon oyer. The declaration then avers the death of his wife, and concludes by alleging, that after her death, the rent in question became due to the plaintiff, and remains in arrear, and unpaid, to him. The lease having been set out upon oyer, becomes part of the declaration, and thus we find that it is a lease made by husband and wife, and that the reddendum and covenant to pay rent, are in these words:—"yielding and paying, therefore, yearly, and every year, during the said term, unto the said *J. Hill* and *Nancy* his wife, *her heirs or assigns*, the rent or sum of 24*l.* And the said *J. Saunders* doth hereby covenant to and with the said *J. Hill* and *Nancy* his wife, *her heirs and assigns*, that he the said *J. Saunders* will pay unto the said *J. Hill* and *Nancy* his wife, *her heirs or assigns*, the said rent." The defendant, having executed the deed, is estopped from saying that no interest passed under it, but he is at liberty to say that that interest has been determined. Looking at the declaration alone, I should entertain very great doubt whether the plaintiff could be entitled to recover, because the form of the indenture shews the intent to have been, that upon the death of the wife, the rent should be paid to her heirs, and there is no covenant by the defendant to pay rent to the husband, after the death of the wife. But the real question here, and the only one which we need decide, is, whether the third plea does or does not shew sufficient matter in bar of the plaintiff's right of action. It alleges, that the plaintiff never had any estate in the premises, except in right of his wife, whose estate the parcels of land in the declaration mentioned were. It is said, that this is not a positive allegation that the wife was seised of the premises, but I think the objection fails. It seems to me that this is an allegation of two facts, the relative order of which is immaterial; now, if we transpose them, the plea will be clearly good, for then it will allege, "that the parcels of land in the declaration mentioned, were the

estate of *Nancy*, the wife of the plaintiff, and that the plaintiff never had any estate in the premises, except in right of the said *Nancy*." It then alleges, that before any part of the rent in question became due, the wife died without issue; whereupon, all the estate which the plaintiff ever had in the premises, altogether expired, ceased, and determined. It appears to me, that these are positive and traversable allegations of facts, upon which the plaintiff might and ought to have taken issue. He might have replied in various ways, either that the estate was not the wife's, or that he had an interest beyond her life, or that his estate did not expire at her death. I admit that the plea is informal; but I think that in substance and effect it is good as a bar to the claim set up by the declaration, and, consequently, that the judgment of the Court below must be affirmed.

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BAYLEY, J.—It is not necessary to assume, either that the wife was seised in fee, or that the lease was valid within the statute of 32 *Hen.* 8, c. 28, in order to support the judgment for the defendant. It is only necessary to arrive at the conclusion, that the wife had some interest, and the husband, except in her right, none; and I think it is impossible to avoid coming to that conclusion. The declaration, which purports to state the legal effect of the lease, alleges that the plaintiff and his wife demised; consequently, the wife must have had some estate, and either that would be her own separate estate, or she and her husband would be joint tenants. But the plea shews, that they were not joint tenants, therefore the husband could not have any estate except in right of the wife. Then, common sense, as well as common honesty, shews that the plaintiff has no right to the rent which has become due since the death of his wife. If it could be said here, that the interest of the plaintiff continued after the death of his wife, the same might have been said in

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Blake v. Foster (a), but that was a decision against the validity of such a claim ; and that case is, at least, an authority to shew, that the defendant was not estopped from saying that the interest of his lessor was originally a limited one, and that it had determined before the alleged breach of covenant was committed.

HOLROYD, J.—I concur in thinking that the judgment of the Court below was right. The declaration, which is not drawn with a *testatum existit*, alleges, that the husband and wife demised ; the lease, therefore, must be taken to operate as a *demise* by the two, which it could not be, unless the wife had some interest : because, although, without such interest it might work by estoppel, it certainly could not operate as a *demise* by her. The husband also had a sufficient interest to render the lease operative as a demise by him ; for a guardian in socage may demise, and a lease made by him may be pleaded as such, although the term arises in the seisin of the infant. It seems to me, therefore, that the third plea, though informally framed, contains material and traversable allegations. It states that the plaintiff's interest expired at the death of his wife, and that the heir entered. These are facts upon which the plaintiff might have taken issue, and the truth of which he has admitted by his general demurrer. It has been said, that the husband is a mere stranger as regards the lease, and that the defendant is estopped from denying his title ; but it should be observed, that the defendant is a mere stranger as regards the interest of the lessor, and, therefore, that he is entitled to shew, generally, that it has ceased ; as it has been held, that a lessor may state generally, that a lease is vested in an assignee by various mesne assignments, without setting them out at length, which the assignee must do, *Dean of Bristol v. Guyse* (b). Then it has been said, that the lease was only voidable, not void ;

(a) 8 Term Rep. 487.

(b) 1 Saund. 112, n. (1).

and that the plaintiff was entitled to rent until the entry of the heir. But I think the plea alleges that which is equivalent to an allegation of entry by the heir, namely, that the heir threatened to evict the defendant, and that he attorned tenant in order to prevent it.

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LITLEDALE, J.—I am of the same opinion. The lease, as set out on oyer, shews that the defendant covenanted to pay rent to the heirs of the wife after her death. He pleads that the wife died before the rent now claimed became due, and that the plaintiff's interest has expired; and he sets forth that which is equivalent to an averment of an entry and eviction by the wife's heir. The merits, therefore, are clearly against the plaintiff, and it seems to me, that the law is against him also. It has been argued, on his behalf, that this being a covenant with husband and wife, enures to the survivor, and that the defendant is estopped by the deed. But the plea answers that objection, because the lease shews that the wife had some interest, and the plea avers that she had the whole interest; therefore, it avers, with truth, that the husband's interest determined at the death of the wife, which the defendant is not estopped from shewing. Besides, the general demurrer admits the facts alleged in the plea, and if they are true, it is quite clear that the plaintiff has no right to maintain this action.

Judgment affirmed.

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DECLARATION in indebitatus assumpsit, containing fourteen counts. The first eight counts were founded on promises made to the plaintiff, and to his three partners, several counts on promises, averred that before and at the time of the making the said several promises, defendant was in parts beyond sea, and afterwards returned, which

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(all since deceased), *Thomas Plummer, Thomas William Plummer, and John Foster Barham*. The third count was for del credere commission, guaranteeing the solvency of underwriters; and the seventh was for interest. The ninth and tenth counts were for interest due to, and upon an account stated with the plaintiff and two of his partners, after the death of one. The eleventh and twelfth were upon similar causes of action accruing to plaintiff and *J. F. Barham*, after the death of *T. W. Plummer*; and the thirteenth and fourteenth were upon the like causes of action accruing to the plaintiff alone, as surviving partner. Pleas—1. Non-assumpsit to the whole declaration. 2. The Statute of Limitations. 3. A set-off. 4. By way of estoppel to the first, second, fourth, sixth, and eighth counts, that plaintiff ought not to be admitted to say, that defendant undertook and promised as in those counts, or any of them, mentioned, because plaintiff and his three late copartners on the 27th February, 1817, in a certain Court of Judicature of our sovereign lord the king, holden in parts beyond the seas, in and for the island of *St. Christopher*, to wit, a certain Court of Record, called the Court of King's Bench and Common Pleas, before *John Garratt*, chief justice, &c., at, &c., impleaded the said defendant in a certain plea of trespass on the case upon promises, and in that suit declared against the defendant amongst other things, for that whereas, &c., (setting forth the declaration in the former action totidem verbis, which appeared to be for the same identical causes of action mentioned in the several counts to which this plea was applicable); that to such declaration defendant

was his first return after making *said several* promises, &c.: held, that the word "several" might be taken distributively, and construed to mean that it was defendant's first return after "each and every" of the promises; and that at all events the want of these latter words was only ground for special demurrer.

A bailable writ, with an *ac etiam* clause *upon promises*, is a good continuance of a non-bailable bill of *Middlesex*, in *trespass*, so as to avoid the Statute of Limitations, and the continuances may be pleaded without a clause of *sicut pluries*.

A judgment obtained by defendant in the Colonial Courts cannot be pleaded by way of estoppel to a declaration in this country for the same cause of action, unless it is shewn that the judgment so obtained would be final and conclusive in the Colonies.

pleaded non-assumpsit, upon which issue was joined : and such further proceedings were thereupon had in the said former suit, that afterwards, to wit, at, &c., the said issue joined was tried by a jury of twelve men, and as to that issue the jurors of that jury upon their oath did say, that they found for the defendant with one penny costs. The plea then stated *that judgment was given for the defendant upon and agreeably to the said verdict*, and that judgment was affirmed by a court of error in the island, and by the king in council, which said several judgments are still in full force as by the record, &c. Averment that the said proceedings so had in the courts of the said island, and in the said Court of privy council, were at the times when they were so had, within the jurisdiction of the same courts respectively, and were carried on in conformity with, and according to, the due course of law at those times established, and in force in the island aforesaid. And that the said several sums and debts in the first eight counts respectively mentioned, were and are parcels of the said several sums of money, and of the said supposed debts mentioned in those parts of the declarations in the said former suit, &c., and that the defendant did not promise or undertake in respect of the said sums or debts in the first eight counts mentioned, or any of them, or any part thereof, otherwise than was alleged in those parts of the declaration in the said former suit, which are herein above set forth. And this, &c., wherefore, &c. 5. A similar plea to the third count. 6. The like plea to the seventh, ninth, eleventh, and thirteenth counts ; and 7 and 8. The like plea to the first and the eighth counts, *in bar* instead of by way of *estoppel*. Replications, similiter to the plea of non-assumpsit. To the Statute of Limitations, as far as it related to the first ten counts of the declaration, " that before and at the time of the making of the said several promises in those counts mentioned, defendant was in parts beyond the seas, to wit, in the island of *St. Christopher*, in the *West Indies* ; and defendant, afterwards, to

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wit, on the 1st of *January*, 1820, returned to this kingdom, to wit, at, &c., which return of defendant was his first return into this kingdom after the making of the said *several* promises in those counts mentioned, and within six years next after the return of the said defendant into this kingdom, to wit, on the 24th day of *January*, 1820, &c., the plaintiff, together with the said *John Foster Barham*, since deceased, for the purpose of recovering the damages sustained by reason of the not performing the said *several* promises in those counts mentioned, sued and prosecuted out of the Court of King's Bench against the said defendant, a bill of *Middlesex*, returnable on *Friday next after eight days of St. Hilary*, to answer the said plaintiff, and the said *John Foster Barham*, in a plea of trespass." It then set out various writs alleged to have been granted to plaintiff in the form aforesaid, continuing the process from time to time. In the last writ was an *ac etiam* clause upon promises for 3100*l*. The replication also stated the death of *John Foster Barham*, the co-plaintiff. It then averred that the first-mentioned precept was so sued out and prosecuted by the plaintiff and *John Foster Barham*, with intent to implead the defendant upon and for the said several causes of action, in the said first ten counts mentioned, and to cause defendant to appear in the Court here; and, upon his appearance, to declare against him for the several causes of action in those counts mentioned; and that according to the said intent, plaintiff afterwards, to wit, in this same *Michaelmas* term, exhibited his said bill, and declared thereon against defendant, to wit, at, &c., and this, &c., wherefore, &c. To the fourth and remaining pleas the plaintiff replied specially, that the only evidence submitted to the jury in the island of *St. Christopher*, were two affidavits setting forth the plaintiff's cause of action, and verified pursuant to the statute 5 *Geo. 2*, c. 7; that the verdict ought to have been found for the plaintiff, and that no proceeding in the nature of a writ of attain lies upon judgments so given in the Colonial Courts,

either in such courts or elsewhere. Demurrer to the replication to the third plea, assigning for cause “ that the said last-mentioned precept or writ, requiring the defendant to answer in a plea of trespass, *and also to a bill to be exhibited for 3100l. upon promises*, did not well and sufficiently continue the process in the replication previously set forth, by which the defendant is required to answer in a plea of *trespass* only ; and also the process in the replication set forth does not appear to have been continued by alias and pluries precepts, or writs, according to the course and practice of the Court here ; and also that it does not appear by the replication that the plaintiff had not returned to this kingdom after the making of the said promises and undertakings in the said first eight counts mentioned, and more than six years before the suing out of the first-mentioned precept.” Joinder in demurrer.

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Manning, for the plaintiff, confined himself in the first instance, to the pleadings on the Statute of Limitations. The first objection arising on the other side is, that the suing out a bailable writ, containing an *ac etiam* clause in assumpsit, is a discontinuance of an action by bill of *Middlesex* in trespass, and consequently that the Statute of Limitations is a good bar to this action. Now that is not so, for a common bill of *Middlesex* in trespass, will connect with a bailable writ, containing an *ac etiam* clause in assumpsit. The alleged trespass is the substance of the bill of *Middlesex*, and the *ac etiam* clause in the subsequent writ, is introduced merely for the purpose of shewing the jurisdiction of the Court. The *ac etiam* clause is no part of the process ; it is merely introduced in compliance with the statute 13 Car. 2, st. 2, c. 2, by which it is provided, that no person arrested upon any bailable process, wherein the true cause of action is not particularly expressed, shall be compelled to give security for his appearance in any sum not exceeding 40*l.* Therefore it does not alter or affect the character of the process itself. On this principle, the Court in *Barber v.*

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Lloyd (a), refused to set aside the bill of *Middlesex*, it being objected, that it was to answer the plaintiff in a plea of *debt*, instead of trespass, and also to a bill to be exhibited in a plea of trespass upon the case. If this objection were to prevail, the effect would be, that a plaintiff who had sued out non-bailable process, solely for the purpose of keeping his cause of action alive, would be unable after the lapse of six years, to follow up his suit by holding the party to bail for a larger sum than 40*l.*, although the debt was much larger, which would be productive of great hardship and inconvenience. The second objection raised on demurrer is, that the process set forth in the replication, does not appear to have been continued by alias and pluries precepts or writs, according to the course and practice of the Court here. Now the *sicut alias*, and the *sicut pluries*, form no part of the writ, and therefore in practice need not be set out in the replication. There are two modes of replying these continuances: first, by stating that the defendant did not appear to the first process; and second, that the plaintiff "prayed other process in the form aforesaid, which was granted to him," without taking any notice of an alias and pluries in terms. Instances of this kind occur in *Liber Placitandi*, or *Thompson's Entries*, 81, and *Lill. Ent.* 104 and 122. In the case of *James v. Englefield (b)*, to a plea of the Statute of Limitations drawn by Lord *Raymond*, the plaintiff replied a *latitat* issued, and that upon the non-appearance of the defendant he prayed further process, "which was granted to him in form aforesaid;" but the subsequent process is not in any other manner designated as an alias, and the defendant rejoined *non-assumpsit infra sex annos ante emanationem brevis*. Still the process here sued out, would be sufficient to avoid the Statute of Limitations, without shewing continuances by alias and pluries writs, *Leadbeter v. Markland (c)*. The third objection is, that it does not appear


(a) 2 T. R. 513. (b) Lill. Ent. 33. (c) 2 Sir W. Bl. 1131.

by the replication, that the defendant had not returned to this kingdom after the making of the said promises and undertakings in the said first eight counts mentioned, and more than six years before the suing out of the first mentioned precept. This objection is answered by referring to the replication itself, which contains a distinct allegation, that the defendant did not return to this kingdom after the making of his promises and undertakings, and more than six years before the suing out of the writ.

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The Court being informed that *Manning* had finished his argument on this part of the case, desired to hear

H. I. Stephen contrà. First, it is submitted that the replication to the plea of the Statute of Limitations, is defective in point of mere pleading. The objection to it has not been quite understood on the other side. The replication states, "that before, and at the time of the making of the several promises in the first ten counts mentioned, the defendant was in parts beyond the seas, and that afterwards, on the 1st *January*, 1820, he returned to this kingdom, which return was his first return into this kingdom, after the making of the said *several* promises in those counts mentioned, and within six years next after the return of the defendant into this kingdom, the plaintiff, for the purpose of recovering the damages sustained by reason of the not performing the said *several* promises in those counts mentioned, sued a bill of *Middlesex* against the defendant." Now there are two objections to this replication; first, every word of it may be consistent, and yet it may afford no answer in point of law, for the first eight promises being laid in 1812, and the ninth and tenth in 1818, non constat, but from this mode of pleading, the defendant may, after the making the first eight promises, have returned to *England*, then gone back to *St. Christophers*, and after making the ninth and tenth promises there, have returned again to *England* on the 1st *January*, 1820; and second, the replication is evasive, for although

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it alleges that it was the defendant's first return after the making of the said *several* promises in those counts, and that the damages were sustained by reason of the not performing of the said *several* promises ; yet it does not add the words "each and every of them," which it ought to have done. It does not satisfy the words of the statute 4 *Ann.* c. 16, s. 19, which provides by way of exception to the Statute of Limitations, that if any person against whom there is any cause of action shall be beyond the seas at the time that it accrues, the action may be brought against him within six years after his return. Therefore, where the causes of action are several, as here, the precedents go on to allege that the return after the suit commences, was the first return after the causes of action, "and each and every" of them, first accrued. Some allegation to that effect is necessary, in order to shew that there was no return previous to that alleged, and that the plaintiff proceeded in his suit within the six years, subsequently to any of the causes of action declared upon. This is the mode of pleading as given in *Wentworth's Precedents* (a). The replication therefore is evasive and uncertain. [*Holroyd, J.* It seems to me that the words "said *several* promises," would, by necessary intendment, include each and every promise alleged. *Abbott, C. J.* Suppose you had taken issue upon the allegation that this was not his first return after the making of the said *several* promises, and it was found that it was, that would be good against the defendant]. In that case of course the allegation of diversity would be immaterial. [*Abbott, C. J.* At all events, unless you demurred specially, I think the objection cannot now avail]. Secondly, The substantial objection to the replication is, that it does not shew any suit commenced within six years, and continued down to the present time ; and the question is, whether a common bill of *Middlesex* in trespass, will connect with a subsequent bailable writ, containing an *ac etiam* clause in

(a) 1 *Went.* 327. 3 *Id.* 205.


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assumpsit. The replication alleges, that on the 24th January, 1820, the plaintiff, together with one John Foster Barham since deceased, sued and prosecuted out of the Court of K. B. a bill of *Middlesex*, against the defendant, returnable in *Hilary* term, to answer in a plea of trespass; and after setting out various other bills of *Middlesex*, with the usual returns, continuing the process from time to time, it alleges that the plaintiff brought another precept to be directed to the sheriff, commanding him, that he should take the defendant and keep him to answer the plea aforesaid, and also to a bill to be exhibited for 3100*l.*, upon promises, according to the custom of the Court. The concluding averment, that the first-mentioned precept was sued out "with intent to implead the defendant upon and for the said several causes of action, in the first ten counts mentioned," will, it is submitted, make no difference in the case, because, unless the first and the last writ will connect, the intent of the plaintiff will not cure the objection. The last writ, *ex vi termini*, indicates a totally different cause of action from the non-bailable writ in trespass. [*Bayley, J.* Does it not indicate the same form of action, with an addition?] The plaintiff commences his suit with a non-bailable writ in trespass, and then he proceeds with a bailable writ with an *ac etiam clause in assumpsit*. This, it is submitted is not merely an irregularity, but a discontinuance of the first suit, and the commencement of a new one. There is a manifest want of identity between the first and the last process; the first suit is broken and discontinued, and cannot be connected with the subsequent one so as to take the case out of the Statute of Limitations. The objection is not, that the suit was informally begun, but that it did not begin with a view to the Statute of Limitations, until the *ac etiam* writ was sued out, and consequently the statute is a bar to the action. The case of *Leadbeter v. Markland*, which is lax enough, certainly, will not obviate this objection, because it only goes to shew that a suit well begun, but continued informally or

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irregularly, will be sufficient to evade the operation of the statute. The same observation applies to *Carver v. Lawes* (a), and *Beardmore v. Rattenbury* (b). These were cases in which the want of strict continuance might be cured or supplied by ex post facto matter, but this is not a case of that description, because here there are totally different writs, which cannot by any possibility be connected. An *ac etiam* writ cannot be a good continuance of a common non-bailable writ, because the effect of the former is, totally different; it implies arrest and bail, 1 Keble 598. [*Bayley, J.* It is there said, that the *ac etiam* was invented by the clerks for avoiding the statute 13 Car. II, c. 2. "But the *writ* is at common law before."—*Abbott, C. J.* Suppose the *ac etiam* clause to be bad, still the writ would be good for a common appearance]. Then the trespass part of the writ would be insufficiently alleged, for the *ac etiam* is the substance of it, *Barber v. Lloyd* (c), *Cox v. Munday* (d). [*Bayley, J.* Cases have decided that if the *ac etiam* part is bad, it does not vacate the process. The defendant is discharged on common bail, and the plaintiff stands on the other part of the writ]. But here the *ac etiam* would be sufficient to hold the defendant to bail. [*Bayley, J.* On this record we cannot tell whether the party is arrested or not]. But the objection is, that this is a different writ in its kind from a common bill of *Middlesex*. The general character of the former is totally distinct from the latter, and they cannot in their nature be connected. Suppose a suit to be begun by a common writ, and continued by an original, could it be said that they would connect; and yet an *ac etiam* differs precisely in the same way. But even admitting that the last can be considered as a continuance of the first writ, still it can only be by a regular clause of *sicut pluries*, *Benson v. King* (e). There, three latitats were sued out at different

(a) Wills 225. (b) Ante vol. i. 27, S. C. 5 B. & A. 452.

(c) 2 T. R. 513. (d) Sir W. Bl.

(e) 1 Tidd, 161, 8th ed. See Inst. Cler. 53. Off. Brev. 25. 2 Rich. Pr. K. B. 81. Lib. Plac. 151.

times for the same cause of action, and the defendant appeared upon the second, and signed a *non pros* for not declaring; whereupon the Court ordered the continuances subsequently entered upon the first to be struck out, being of opinion that the first latitat was made an end of by the second; and if it were not so, the practice was clear and well known, that the continuances must be by alias and pluries, and not by original writs of latitat. If then this last writ is to have the effect of a continuance of the first, there must be the regular form of continuances. It does not appear from the replication that there have been regular continuances; this may be the precise case mentioned in *Benson v. King*, where the second latitat was treated as a new action. But even supposing that it contained a clause of sicut pluries, it would have been inapplicable to this case, for it could not be truly said in the *ac etiam* writ that the sheriff had been *often commanded* to enforce the defendant's appearance to a plea of trespass upon *promises*, inasmuch as that was the very first writ which commanded the sheriff to enforce an appearance for such a purpose. It is true, there is a class of cases in which the want of a strict continuance has been disregarded (a), but the plaintiff cannot shelter himself under those cases, because here there has been a departure from the process by which the suit was first commenced, and he has resorted to a totally different writ, which destroys the continuity of his proceedings. If there be any meaning, object, or use, in the clause of sicut pluries, the regular form of pleading requires that it should be introduced; but if it be senseless and useless, then of course it must be considered unnecessary.

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Manning in reply, was stopped by the Court.

ABBOTT, C. J.—I am of opinion that the replication is good. It professes to be an answer to the plea of the Sta-

(a) See *Matthews v. Phillips*, 2 Salk. 424.

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tute of Limitations, as far as that relates to the first ten counts of the declaration. The record avers, that the defendant was abroad at the time of making the several promises and undertakings in the first ten counts mentioned, and that he afterwards returned to this kingdom on a certain day, which return was his first return after the making of the said several promises and undertakings in those counts mentioned. Now it is objected, that this replication does not aver that this was the first return after "each and every" of those promises. It is by no means clear to me, that the meaning of the words, "several promises," is not so; they may be taken distributively, and construed to mean, that it was his first return after *each* promise. But assuming that to be otherwise, still I think the want of the words, "each and every of them," is mere matter of form, and that the defendant, in order to have taken advantage of it, should have demurred specially, which I think he has not done with sufficient distinctness. Another objection is, that the first writ in this case was without an *ac etiam* clause, whereas the last writ contained it. There is, however, the usual averment, that the first writ was sued out with intent to declare upon the several causes of action mentioned in the first ten counts. But it is said, that the last writ cannot be a continuance of the first, because the effect of each is totally different; by the one, the party may be held to bail, but by the other he cannot. There would be a great deal of weight in this objection, if, in point of law, the plaintiff could not declare upon the first writ in the way he has done; but inasmuch as he might have so declared, it seems to me that the insertion of the *ac etiam* into the subsequent writ, is not a departure, but merely an addition to the first. It is merely saying, "I will secure the appearance of the defendant, by causing him to be arrested." Another objection is, that there do not appear to be alias and pluries writs, and it is said there could not be such writs because the first is without the *ac etiam* clause.


I am by no means clear, that there might not be continuances by alias and pluries writs. I think they might be made so in part, if not in the whole. But taking it to be otherwise, still this is merely an irregularity in process, and not a discontinuance; and being merely an irregularity, it will not disable the plaintiff from avoiding the Statute of Limitations. I therefore think, that, on this part of the case, the plaintiff is entitled to judgment.

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The other judges concurred.

Stephen was then called upon to support the pleas themselves. The judgment of the Court in the island of *St. Christopher*, is here pleaded in two ways: first, as an estoppel; and, second, as a bar to this action. It is submitted, that it may be pleaded in either way. If it were held, that the judgment of a colonial court is not pleadable in bar, to an action commenced in this country for the same cause, the consequence would be that a defendant who had obtained a verdict and judgment in his favour, in the colonies, would never be in safety, and might be involved in interminable litigation and inconvenience. Nor would that be all; for, of course, the converse of the proposition would hold; so that a defendant who had obtained a verdict in his favour in this country, would be still liable to be sued for the same cause of action in the colonial courts,—a consequence which would materially affect the validity of the verdict of a *British* jury. The case of *Walker v. Witter*(a) will be relied upon by the other side, as an authority for saying that a colonial judgment is not conclusive, and that it is, at least, examinable in the courts of this country, and cannot be pleaded by way of estoppel; but that case by no means decides against the conclusiveness of such a judgment. It only goes to shew, that debt lies upon a colonial judgment, and that the defendant may plead nil debet, and cannot plead


(a) Doug. 1.

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nul tiel record. All that was there said was, that the matter was tryable by the country; and from the opinion expressed by Lord *Kenyon*, in *Galbraith v. Neville* (a), it seems that no inference is fairly deducible from *Walker v. Witter*, that such a judgment would not be conclusive. But in *Walker v. Witter*, it did not appear that the judgment had been obtained by *verdict*. There is a force in the verdict of a jury, which does not belong to a judgment, which may be obtained without the intervention of the jury. A verdict is in general conclusive of the fact in issue, and cannot be impeached. Here there has been a finding, by a colonial jury, that the defendant did not promise. That circumstance did not exist in *Walker v. Witter*. In Co. Litt. 27 b, it is said, that an issue found by verdict shall always be intended true, until it be reversed by attain; therefore, a verdict is in itself an estoppel upon the same matter of fact afterwards arising between the same parties. In *Bro. Ab. tit. Estoppel*, it is said, that the law abhors contrary verdicts. It will, probably, be said, that attain does not lie in the *West Indies*, and therefore that the verdict of a colonial jury is not so absolutely unimpeachable, as a verdict would be in this country where attain does lie; but the answer to that is, that the conclusiveness of a verdict does depend upon the doctrine of attain lying or not lying. The doctrine upon which the conclusiveness of the verdict stands, is, that it is a declaration of the truth, *Bro. Ab. tit. Estoppel*. pl. 163. 7 Edw. 4, pl. 1. But the doctrine of attain does not apply, at common law, to personal actions, and therefore it is immaterial whether attain does or does not lie in the *West Indies*. The answer however to the case of *Walker v. Witter*, upon which the most reliance may be placed, is, that there the plaintiff having obtained a judgment in his favour in the colonies, chose *voluntarily* to bring an action upon it in *England*; and therefore, as against him, it might reasonably be examinable here. But that case does

(a) Id. 6. n. 2.

not apply to the present. Here the defendant is *compelled* to come into an *English* court, and he has a right to rely upon the colonial judgment by way of estoppel. In *Walker v. Witter*, the colonial judgment was not offered by way of estoppel, but the plaintiff thought proper to declare upon it; and there is a great difference in the effect of the same matter when pleaded by way of estoppel, and when it is offered merely as matter of evidence, *Vooght v. Winch* (a); but *Phillips v. Hunter* (b), which was long anterior to *Vooght v. Winch*, decides, that it by no means follows, that a judgment when relied upon as matter of estoppel, is examinable. Now there are several direct authorities to shew, that judgment for a defendant in a *foreign* court is a conclusive bar to a second action for the same demand in this country; *Burrows v. Jemine* (c), *Hutchinson's case* (d), *Roche's case* (e), *Roche v. Garmon* (f), *Duchess of Kingston's case* (g). As to the general law, with respect to the effect of a foreign recovery, the acknowledged principle of *English* law is, that a judgment once recovered by one party, in a personal action upon the merits, is a conclusive bar to another action brought on the same grounds; and any trifling distinction as to the manner of claim, or the form of the proceeding between the two cases, will make no difference, if there be a substantial identity; *Ferrer's case* (h), *Robinson v. Robinson* (i), *Tothill v. Ingram* (k), *Lechmere v. Toplady* (l), *Barwell v. Kensey* (m), *Hitchen v. Campbell* (n); and this rule extends to the case where the first judgment was obtained in an inferior *English* court; 3 *Hen.* 4, 11, pl. 13: *Fielding v. Serratt* (o), *Mico v. Morris* (p), and *Briscoe v. Stephens* (q). [Bayley, J. The difficulty I have had is, that we are ignorant what the law of *St. Christopher's* is;

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(a) 2 B. & A. 662.

(b) 2 H. Bl. 410.

(c) Stra. 733.

(d) Show. 6.

(e) Leach, 125.

(f) 1 Ves. 159.

(g) 20 How. St. Tr. 355.

(h) 6 Rep. 7.

(i) Cro. Jac. 14.

(k) 1 Vent. 314.

(l) 2 id. 169.

(m) 3 Lev. 172.

(n) 2 Sir W. Bl. 827.

(o) Comb. 375.

(p) 3 Lev. 234.

(q) 2 Bing. 218.

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whether a judgment in that island would be conclusive or not. It would be hard to hold, that that which is not conclusive there, would be conclusive here.] Then it is a matter of discretion, whether the Court will allow the pleas to be amended in that respect. The pleas, as they at present stand, pursue the form in which the colonial record itself is drawn up, which is certainly different from the form observed in this country. [*Bayley, J.* The pleas allege merely, "that the jury found for the defendant upon and agreeably to the said verdict. This does not necessarily imply a final and conclusive decision in the defendant's favour. You plead this by way of estoppel. Now the law says, that estoppels are odious, because they may tend to defeat the justice of the case]. The pleas shew, that in an action of indebitatus assumpsit, an issue of non assumpsit was joined between the parties; and they allege, that as to that issue the jury found for the defendant. This is tantamount to an allegation, that they found that the defendant did not undertake or promise. It imports a decision on the merits; and if so, then it must be taken to be final and conclusive. It is further alleged, that the judgment was affirmed in a court of Error in the island, and that such judgment was reviewed before the king in council, and confirmed. Under such circumstances, it is impossible to say, that the cause was not finally determined between the litigating parties. [*Littledale, J.* Perhaps the plaintiff, after his case had gone a certain length, might elect to be non-suited, or he might have been turned round on some technical objection]. This can only be presumed. There is nothing on the record to shew that such was the fact. [*Littledale, J.* In some countries, a plaintiff cannot be nonsuited; and therefore he may be obliged to go on, and have a verdict found against him, so as to shut out the real merits]. The difficulty here is, in saying, from what appears on the record, that the determination was not final and conclusive. [*Bayley, J.* You do not tell us, by your pleas, that by the law of *St. Chris-*

topher's, such a decision would be final and conclusive there.—*Holroyd*, J. It does not clearly appear from the record, that the judgment was conclusive. We cannot take notice of the law of the colonies.

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BAYLEY, J.—The case of *Levell v. Hall*(a), is an authority to shew that a former judgment is not conclusive. That was debt on an obligation. The defendant pleaded that the plaintiff brought another action upon the same bond in *London*; and that the defendant had thereto pleaded non est factum; and that the jury found that it was not his deed. The entry upon the verdict there was, that the defendant should recover damages against the plaintiff, et quod eat inde sine die, &c.; but no judgment, quod querens nihil capiat per breve; so there was not any judgment so as to bar him in another suit; therefore the Court held, that the plea was insufficient. You seek here to shut out inquiry. We say, that the judgment ought not to be so conclusive as not to be examinable.

ABBOTT, C. J. You want to shut the door against all inquiry, because, the question having been once disposed of, it may not be again discussed. There is nothing on these pleadings to shew, that the judgment would have been conclusive below; and therefore I think the plaintiff is entitled to judgment on these pleas. I think the case of *Levell v. Hall* applies, in principle, strongly to this case.

Stephen then applied for leave to amend, on payment of costs, but,

The COURT said, after argument, this could not be, and gave

Judgment for the plaintiff.

(a) Cro. Jac. 284.

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CARR v. HINCHLIEF.

Plea to assumpsit for goods sold and delivered, "that the goods were, with the privity of plaintiff, sold and delivered to defendant by J. S., the agent of plaintiff, in the name, and as the goods of J. S., and that defendant never knew plaintiff as the owner; that at the time of the sale and delivery, J. S. was, and still is, indebted to defendant in a sum exceeding the price of the goods; and that defendant is ready and willing to set off and allow to plaintiff the price of the goods, out of the money so due and owing from J. S.:" Held, good, on special demurrer.

ASSUMPSIT for goods sold and delivered. Pleas, first, non-assumpsit. Second, actio non, because the said goods were, with the knowledge, privity, and consent of plaintiff, so sold and delivered to defendant, by one *J. Summers*, being then and there the agent and factor of and for plaintiff, in his, *J. S.*'s, own name, as the true and sole owner thereof, and as and for his, *J. S.*'s, own proper goods; and that plaintiff did not appear, nor was he known by defendant, at or before the time of the said sale and delivery of the said goods to defendant, as the proprietor of the same, or that he, plaintiff, was in anywise interested therein; and defendant further says, that he then and there bought and accepted, and received the said goods of and from *J. S.*, as the proper goods of him, *J. S.*, and that credit for the said goods was given to defendant by *J. S.*, and not by plaintiff; and defendant further says, that *J. S.*, before and at the time of the sale or delivery of the said goods, and thence continually hitherto, was and is indebted to defendant in the sum of 600*l.*, for money before then paid by defendant for *J. S.*, at his request, and for other money before then had and received by *J. S.*, for the use of defendant, and for other money wherein *J. S.* was found to be in arrear, and indebted to defendant, upon an account stated between them; which sum of money so due and owing from *J. S.* to defendant, exceeds the sums of money due and owing from defendant to plaintiff, upon and by virtue of the causes of action in the declaration mentioned, and out of which sum of money so due and owing from *J. S.* to defendant, he, defendant, is ready and willing, and hereby offers to set off and allow to plaintiff, the full amount of the sums of money due and owing from defendant to plaintiff, upon and by virtue of the causes of action in the declaration mentioned, *according to the form of the statute in that case made and provided*; and this defendant is ready to verify. To the first

plea, a similiter; to the second plea, a special demurrer, assigning for causes, that the said plea amounts only to the general issue; that the sums of money therein set forth and alleged to be due and owing from J. S. to defendant, and out of which defendant offers to set off and allow to plaintiff the full amount of the sums of money due and owing from defendant to plaintiff, upon and by virtue of the causes of action in the declaration mentioned, are not, nor are any of them mutual, according to the form of the statute; and, that the said plea is multifarious, and no certain or complete issue can be taken upon it. Joinder in demurrer.

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Milner, in support of the demurrer. The special plea is bad. In order to establish his defence, the defendant must prove two things: first, that he never knew the plaintiff as the owner of the goods till after the sale; and, second, that the agent owed him a sum equal to the amount claimed by the plaintiff, at the time of the sale. The effect of the plea is to evade the proof of one or other of these points; for if the plea is good, the plaintiff cannot take issue upon them both; he can only take issue upon one, and admit the other pleaded. No case can be found in which such a plea has been so pleaded. All the facts set out in this plea might be given in evidence under the general issue. The effect of the plea is to deny that the plaintiff has any right of action. It amounts in substance to the general issue. The facts here pleaded were held to be admissible in evidence under the general issue, in the two well-known cases of *George v. Clagett* (a), and *Rabone v. Williams* (b). The sale of the goods by the agent, as described in this plea, cannot be considered as a sale by the plaintiff, or as creating a debt owing to him; there is no privity between the plaintiff and the defendant; there is no debt existing between them; there is no confession and avoidance of any contract between them stated in the plea; the plea denies the plaintiff's right of action, and amounts there-

(a) 7 T. R. 359.

(b) 7 T. R. 360. In notis.

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fore to the general issue; and a special plea amounting to the general issue, is bad on demurrer, *Boot v. Wilson* (a). Besides, the debt owing from the agent to the defendant, cannot be set off by way of plea, for it is not a mutual debt within the intent and meaning of the Statutes of Set-off.

Tindal, contra. It must be admitted that the facts here pleaded might be given in evidence under the general issue; but nevertheless the plea is good: for a special plea amounting to the general issue is good, either if it confesses and avoids the plaintiff's right of action, or if it contains matter of law. Now this plea does confess and avoid, for it first admits that the defendant purchased of an agent goods belonging to the plaintiff, which creates a debt, and then avoids, by stating that there is a debt owing from the agent to the defendant. That such a debt may be set off, is clear from the cases already cited, of *George v. Clagett*, and *Rabone v. Williams*, and if that is the law, the defendant is entitled to plead it, for pleading is the language of the law, and this plea contains the very language used by the Court in laying down the law in those cases. Lord *Holt* said, in *Hatton v. Morse* (b), "In assumpsit, the defendant may plead payment, because it admits the assumpsit, and yet he may give it in evidence on non assumpsit." The same rule is recognised as law by Lord Chief Baron *Comyn* (c), and in the modern case of *Wink v. Keeley* (d), two cases by the names of *Bottimley v. Brook*, and *Rudge v. Birch*, are cited, in which pleas similar to the present were held to be good on demurrer.

Milner, in reply. If an agent, duly authorized, sells the goods of his principal, in his own name, as his own goods, and is at the time indebted to the purchaser in more than the value of the goods, the sale gives no right of action to the principal. Now the present plea describes precisely such a sale, therefore it does not confess and avoid the


(a) 8 East, 311.

(b) 1 Salk. 394.

(c) Com. Dig. *Pleader*, (E. 14).

(d) 1 T. R. 619.

plaintiff's right of action, but denies that he ever had one. Neither does this plea contain matter of law. A plea of set-off is a bar by virtue of the statute; but that extends only to mutual debts, and the debt here pleaded is not a mutual debt, and not within the statute; the plea, therefore, is bad for concluding "*according to the form of the statute.*"

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BAYLEY, J.—The plaintiff has assigned two special causes of demurrer to this plea; first, that it amounts to the general issue, and therefore ought not to have been pleaded specially; and second, that the debts are not mutual, and therefore not within the Statutes of Set-off. It must be admitted that the debts are not mutual, unless the principal and the agent are for this purpose identified by law; but *George v. Clagett*, *Baring v. Corrie* (a), and other cases, shew that they may be so identified; consequently that objection fails. The remaining question is, whether the defendant was bound to give this matter in evidence under the general issue, as he might have done, instead of pleading it specially. In the cases already referred to, that was done; but there are two excepted cases, in both of which a defendant has the option either to give his defence in evidence under the general issue, or to plead it specially. The first is, where the plaintiff's right of action is confessed and avoided by matter ex post facto, as by a plea of payment, *Brown v. Cornish* (b), and *Vanhatton v. Morse* (c); or by a plea of accord and satisfaction; *Paramore v. Johnson* (d), and the reason is, as stated by Lord Holt, that it gives colour of action to the plaintiff. The second is, where the plea does not deny the declaration, but answers it by matter of law, *Hussey v. Jacob* (e). That was an action against the acceptor of a bill of exchange, who pleaded that the bill was given for money lost at play, and therefore void by the statute 16 Car. II.,

(a) 2 B. & A. 137. (b) 1 Ld. Raym. 217. (c) 2 Ld. Raym. 787.

(d) 1 Ld. Raym. 566.

(e) 1 Ld. Raym. 87.

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c. 7. The plaintiff demurred, assigning as one objection that the plea amounted to the general issue; but the Court said "where the defendant has special matter consisting not only of bare matter of fact, but intermixed with matter of law, which will avoid the charge or action of the plaintiff, he is not obliged to plead the general issue, but may plead specially; for otherwise he would be obliged to commit a point of law to a jury, who is ignorant of it, which would be absurd." Now it seems to me, that this plea amounts to a confession and avoidance by matter ex post facto. It admits the sale of the goods to the defendant by the agent of the plaintiff; that by the common law constituted a debt from the defendant to the plaintiff, and gave a right of action to the plaintiff, the defence to which arises only out of the legal principle deducible from the Statutes of Set-off. The defendant, however, may not chuse to insist upon that defence, and it is only by matter ex post facto, namely, by insisting upon the set-off, that he avoids the plaintiff's right of action which he had previously confessed. I am therefore of opinion that the plea is good, inasmuch as it confesses a right of action, and avoids it by matter ex post facto. I am also of opinion that the plea is good, as containing matter of law. It is not a denial of the facts averred in the declaration, but a statement of matters which form a legal defence under the Statute of Set-off, and it is as much matter of law as coverture or infancy, which are given as illustrations of this point in the case of *Hussey v. Jacob*, to which I have already alluded. It has been argued that the plea will lead to inconvenience, as it imposes on the plaintiff the hardship of being compelled to admit one half of the defendant's case. Even if that be so, the doctrine of convenience will not justify us in saying that the plea is bad, if upon legal principles we are satisfied that it is good; but I am by no means convinced that the supposed evil will occur. I am not sure that the plaintiff might not have framed his replication in such a manner as to put in issue

both the sale by the agent and the debt owing from him to the defendant, modo et formâ, as stated in the plea. Those two facts, in effect, constitute one ground of defence; and according to the cases of *Robinson v. Bayley* (a), and *Saron v. O'Brien* (b), I am inclined to think such a replication might be supported; but it is not necessary to decide that point, and I do not therefore give any distinct opinion upon it.

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HOLROYD, J.—I have felt considerable doubt upon this case in the course of its discussion, but I am now perfectly satisfied that the grounds of demurrer are insufficient, and that the plea is good in point of law, and an answer to the action. Trying this case by legal principles, independently of the Statutes of Set-off, and taking the contract to have been made as it is stated in the plea, it is clear that either the plaintiff or his agent, *Summers*, might have brought an action against the defendant for the value of the goods, and that the facts set forth in the plea would have furnished no defence. The statute provides that where there are mutual debts between a plaintiff and defendant, the defendant may set off the debt due to him against the debt claimed from him, or in other words, he may apply the sum due to him in payment of the sum due from him, and contend that pro tanto the claim upon him is satisfied, and the debt extinguished. Then, by analogy to the defence thus given by the statute, it has of late been held, that a defendant has a right to say that his debt to the plaintiff is extinguished by another debt due to him from any third person, if such third person can be identified with the plaintiff. Here, *Summers*, the agent, may be identified with the plaintiff, and if the defendant has a right to say that his debt is extinguished by the agent's debt to him, the objection that the plea amounts only to the general issue is removed. Had the plea alleged that there never was any debt at all, it would have amounted to

(a) 2 Burr. 316.

(b) Ante vol. 4, 579.

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the general issue ; but it admits a debt in the first instance, which it contends is extinguished by another debt : consequently, it does confess and avoid the plaintiff's right of action, and for that reason it is a good plea.

LITLEDALE, J.—It is perfectly clear that the facts alleged in the special plea might have been given in evidence under the general issue, and would in that mode have constituted a good defence to the action. The question is, whether the same facts stated on the record do, or do not, constitute a good plea ? I am of opinion that they do. The plea is not an absolute denial of the plaintiff's right of action ; on the contrary, it admits a *prima facie* right, or, as it would be termed in trespass, gives the plaintiff colour, and then avoids it by shewing a set-off to a larger amount, by means of a debt owing to the defendant from the agent of the plaintiff. I am also of opinion that the plea is matter of law ; because the plaintiff's right of action is avoided by the legal right of the defendant to set up the debt of the agent as an extinguishment of the debt due to the plaintiff. The conclusion of the plea, "*according to the form of the statute,*" is, I must admit, somewhat informal and irregular, because the set-off in this case is not strictly according to the statute ; but that is an objection which could only be taken advantage of by special demurrer, and as the plaintiff has not assigned it as one of his causes of demurrer, he is precluded from relying on it now. Upon the whole, I agree, that the defendant is entitled to judgment on demurrer.

Judgment for the defendant.

Milner afterwards obtained leave to amend, upon payment of costs.

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TRESPASS for breaking and entering certain closes, part and parcel of a farm called *Forton Farm*, situate in the parish of *Long Parish*, in the county of *Southampton*, and hunting for game in, upon, and over the same closes, and treading down the grass, &c. Upon the first four pleas no question arose. Fifth plea, that one *James Widmore*, before and at the said several times, when, &c., was seised in fee of and in divers, to wit, 50 acres of land, situate next and adjoining the said closes, in which, &c., and that by deed bearing date 17th *February*, 1736, made between one *Sir Francis Child*, who was seised in fee of the closes, in which, &c., and one *Richard Widmore*, who was seised in fee of the said 50 acres of land, and whose estate therein *James Widmore* at the said times, when, &c., had, the said *Sir F. Child* did grant to *R. Widmore*, and his heirs and assigns, for himself and themselves, for the time being, owners in fee of the said 50 acres of land, the liberty and privilege by himself and themselves, and his and their servants, of hunting for game with dogs in the said closes, at his and their free will and pleasure, as belonging and appertaining to the said last-mentioned lands; concluding with a justification of the trespass by defendant, as the servant of *J. Widmore*. Sixth plea, as

Trespass for breaking and entering a close, parcel of *Forton Farm*. Plea, that *J. W.*, as whose servant defendant justified, was seised in fee of 50 acres of land adjoining the close in which, &c., and that by deed of 1736, between *F. C.*, who was seised in fee of the close in which, &c., and *R. W.* who was seised in fee of the 50 acres, *F. C.* granted to *R. W.*, his heirs and assigns for the time being, owners in fee of the 50 acres, the privilege of hunting for game in the close in which, &c. Replication,

that *F. C.* did not grant to *R. W.* the privilege as in the plea mentioned. Issue thereon. No proof of the grant pleaded, but proof that, by deed of the same date, *R. W.*, who was seised in fee of the manor of *Middleton*, conveyed *Forton Farm* to *F. C.* in fee, reserving all royalties; that from 1753, the gamekeepers of the lords of the manor were accustomed to sport over *Forton Farm*, with the knowledge of plaintiff and his landlords, the owners of *Forton Farm*; that about 14 years ago, plaintiff, by desire of his landlord, gave notice to the gamekeeper of the lord of the manor not to trespass, but that he continued to sport there by the order of the lord of the manor without further interruption:—Held, that upon such evidence the jury could not presume a grant.


Second plea, that *R. W.*, who was seised in fee of the close in which, &c., by indenture of 1736, granted to *F. C.*, his heirs, &c., the close in which, &c., reserving all royalties; deducing title in the said royalties from *R. W.* to *J. W.*, and justifying as servant to *J. W.* Replication, that defendant did not enter the close to exercise the said royalties. Issue thereon:—Held, that upon this issue defendant was bound to prove, first, that he had a right of free warren; and second, that at the time of the supposed trespass he was in the due exercise of it.

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to entering the closes and a little treading down and bruising the grass, that long before the said time, when, &c., one *R. Widmore* was seised in fee of and in the closes in which, &c., and being so seised, by indenture bearing date 17th *February*, 1736, made between the said *R. Widmore*, of the first part; Sir *F. Child*, of the second part; and *W. Guidott* and *A. Guidott*, of the third part; but which deed is since lost, &c., the said *R. Widmore* did grant to Sir *F. Child*, and his heirs, the said several closes in which, &c., in which said closes there then was and still is a certain river, except and always reserved to *Widmore* and his heirs, all royalties, and the soil of the river; that Sir *F. Child* entered into the said closes in which, &c., and was seised thereof in his demesne as of fee, subject to the exception and reservation aforesaid, and the said royalties and the soil of the river then belonging to *R. Widmore*; concluding by deducing title in the said royalties and the soil of the said river from *R. Widmore* to *J. Widmore*, his heirs and assigns; and justifying, that defendant, as the servant of *J. Widmore*, and by his command entered the closes, to exercise the said royalties and right of soil. Replications, to the fifth plea, that Sir *F. Child* did not grant to *R. Widmore* the liberty and privilege as in that plea mentioned; and to the sixth plea, that the defendant did not enter the closes, to exercise the said royalties and right of soil as in that plea mentioned; and issues thereon. At the trial, before *Abbott*, C. J., at the last summer assizes for the county of *Southampton*, a verdict was found for the plaintiff, damages 40s., subject, as to the issues on the fifth and sixth pleas, to the opinion of this Court upon the following case.

The plaintiff, on the day mentioned in the declaration, after notice from the plaintiff not to trespass, entered the closes mentioned in the declaration, being parcel of *Eorton Farm*, for the purpose of beating for and shooting game there, and did beat for game there with dogs. The defendant at that time was the gamekeeper of *J. Widmore*,

esq., in the pleadings mentioned, duly appointed by him as lord of the manor of *Middleton*, otherwise *Long Parish*, in respect of the said manor; and at the time of committing the supposed trespasses was acting as such gamekeeper, and by the order of Mr. *Widmore*. *Forton Farm* contains about 570 acres of land, and every part thereof is situate within the compass or ambit of the said manor, or reputed manor, of which manor and farm, as also of a certain messuage and lands called *Middleton Farm*, otherwise *Long Parish Farm*, adjoining to part of the lands of *Forton Farm*, one *R. Widmore*, long before and until and at the time of the conveyance to Sir *F. Child* hereinafter mentioned, was seised in fee simple. The said manor, or reputed manor was, by the name of the manor or lordship of *Middleton*, alias *Long Parish*, together with the messuage and farm called *Middleton*, otherwise *Long Parish Farm*, and all fisheries, privileges, and royalties to the said manor or farm belonging, conveyed to the said *R. Widmore* in fee simple, in 1698. The estate of *Forton Farm* was conveyed to *R. Widmore* in fee simple in 1706, by a different grantor. *R. Widmore* being seised of the several premises as aforesaid, by deed dated 17th February, 1736, made between himself, of the one part; and Sir *F. Child* of the other part, granted, bargained, sold, and released to Sir *F. Child* in the pleadings mentioned, the tenement and farm called *Forton Farm*, together with the liberty and use of the river and water for watering certain water meadows, except and always reserved unto *R. Widmore*, and his heirs, three closes, particularly named, not being the closes in question, and also all royalties and soil of the river, to hold the same, with the fishery and liberty of fishing in certain parts of the river, unto Sir *F. Child*, and his heirs and assigns, to the use of Sir *F. Child*, his heirs and assigns, for ever. *J. Widmore*, at the said time, when, &c., was seised in fee of the said manor or reputed manor, and the messuage and farm called *Middleton*, otherwise *Long Parish Farm*, deriving his title thereunto from

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R. Widmore, of whom he his heir at law. *Forton Farm* has been in the occupation of the plaintiff nearly 50 years last past, as tenant under *W. Iremonger*, esq., the present owner, and his father and grandfather respectively, all deriving their title to the same under the conveyance to Sir *P. Child*. The plaintiff has been accustomed, during his tenancy, to sport at his pleasure and without interruption over *Forton Farm*. The grandfather and father of *W. Iremonger*, the latter of whom died about six years ago, were not themselves accustomed to field sports, but they resided at a house, called *Wherwell House*, very near to *Forton Farm*, and during their respective lives, their friends and also *W. Iremonger*, during his father's lifetime, and since his decease up to the present time, have been accustomed to sport over *Forton Farm*, without interruption from the lord of the manor, or his gamekeeper, for the time being. As far back as the year 1753, being as far back as can be traced, there are entries in the office of the clerk of the peace for the county of *Hants.*, of the appointments of gamekeepers for the manor of *Middleton*, otherwise *Long Parish*, by the lords for the time being of the said manor. Evidence on the part of the defendant was given at the trial, that for nearly 50 years last past, the gamekeepers of *J. Widmore* and his predecessors were accustomed to sport over *Forton Farm* with the knowledge of the plaintiff and his landlords, and without any interruption, until about fourteen years ago, when *the plaintiff by the desire of the landlord*, gave a notice to the then gamekeeper of *J. Widmore*, then sporting upon the said farm, not to trespass there; but the gamekeeper, on the receipt of that notice; informed the plaintiff that he sported there by the order of his master; and he continued to sport there, after the notice, without any further interruption.

Halcomb, for the plaintiff. The plaintiff claims to have the verdict entered for him on the issues joined on the fifth and sixth pleas, and to that he is clearly entitled.

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The fifth plea fails, because it was wholly unsupported by evidence. That plea sets up a right to sport, under a grant from the grantee in the deed of 1736, under whom the plaintiff derives title, to the grantor in that deed, under whom the defendant justifies. But the plea limits the grant to the parties as "owners in fee of the said 50 acres of land," before described in the plea, and the deed of 1736 contains no such grant; and no other deed of the same date, and between the same parties being produced, none such can be presumed: first, because the deed is not pleaded as a non-existing grant; and second, because, even if it was, a grant for *servants* generally to sport, is contrary to the policy and provisions of the game laws. The fifth plea, therefore, is clearly bad. The sixth plea also is substantially bad, for it does not aver that the grantor in the deed of 1736 had any royalties to reserve, and the implication that he had, does not necessarily arise from the fact of his having reserved them. It will be said, that the replication admits the fact; but that is not so, because the rule of pleading is, that the replication admits the truth of the plea *as pleaded* only. The replication is, that "the defendant did not enter the closes to exercise the said royalties," which is a mixed proposition of law and of fact; of fact, that the defendant at the time of the alleged trespass was exercising a right; and of law, that that right was a royalty; both which the defendant ought to have proved. Again, the sixth plea professes only to justify the breaking and entering the closes, and not the sporting; therefore, under that issue the defendant might, if he could, have proved the exercise of some other royalty than a free warren. [*Bayley, J.* There is nothing in the plea respecting free warren; the defendant does not claim a free warren; if he did, he should have pleaded it by grant]. The claim is of *royalties*, and there is no royalty, except a free warren, that can confer the exclusive right of sporting; therefore, the defendant was bound to shew that he had a free warren. But the evidence not only fails to prove that, but


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goes far to disprove it, for a free warren is an exclusive right to kill game within the warren, and the evidence was, that the right was exercised jointly by both the parties from whom the plaintiff and defendant respectively derive title. Besides, a free warren is a distinct estate of inheritance, collateral to the land, and will not pass but by express words of conveyance, and the deed of 1736 certainly contains no conveyance of a free warren.

Carter, for the defendant. First, the replication to the sixth plea amounts to an admission, that the grantor in the deed of 1736, had the royalties which he thereby professed to reserve; and if the plaintiff did not intend to make that admission, he ought to have demurred to the plea. The word *royalties* is large enough to comprehend free warren, and must be taken here to mean free warren. A free warren is not, of necessity, an exclusive right: it may be exercised jointly by the owner of the soil and others. A prescription for a lord of a manor, his tenants and farmers, to fowl in the warren of another, has been held good on demurrer; *Davies's case* (a); therefore, the right in this case having been exercised by both the parties jointly, does not militate against that right being a free warren. Secondly, the deed pleaded by the fifth plea may be presumed, like any other non-existing grant. [*Bayley, J.* It is not pleaded as a non-existing grant, but with a date; and there was a deed produced of the same date, but of a different nature; then how can any other of the same date, and between the same parties be presumed?] There was evidence to shew that the right in question had been exercised for 50 years by the parties under whom the defendant justifies, without interruption from the plaintiff or his landlord, and in defiance of a notice not to trespass which was given by the plaintiff fourteen years ago; and that is a sufficient foundation for presuming the grant pleaded in this plea.


(a) 3 Mod. 246.

Halcomb, in reply. The exercise of the right proved, was all within the period of the plaintiff's tenancy, and it cannot be inferred that the landlord acquiesced in it. There is no injury to the reversion, and the landlord could not have maintained an action for the trespass, without averring and proving that his reversion had been injured, 1 *Saund.* 322, note 5. *Jackson v. Pesked* (a). The landlord, therefore, cannot be bound by such an exercise of right, which may have been authorized by his tenant, but which he may not have had the power to prevent. *Daniel v. North* (b), *Wood v. Veal* (c). Besides, the plaintiff has no estate of inheritance in the land, therefore the defendant, in order to avail himself of the plaintiff's acquiescence, should have pleaded his right, not as a grant which affects the inheritance, but as co-extensive only with the plaintiff's estate.

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BAYLEY, J. The sixth plea does not aver that the grantor in the deed of 1736 had any royalties to reserve, but avers only that he did reserve *all royalties*. The replication to that plea denies that the defendant entered upon the land to exercise *the said royalties*. Upon that the defendant joined issue, and upon that issue he was bound to prove two things; first, that he had such a royalty as he claimed, namely a free warren; and second, that he was in the due exercise of it at the time of the alleged trespass. The defendant has not adopted the regular and proper mode of pleading a right of free warren, but even if he had, he has adduced no evidence to support the plea. A grant is matter of record, and therefore the defendant, if he had any grant, ought to have produced it; or at least he ought to have proved that due search was made for it, both among Mr. *Widmore's* title deeds, and in the proper offices where it was likely to be found. For these reasons I am of opinion that the verdict ought to be entered for the plaintiff,

(a) 1 M. & S. 234. (b) 11 East, 372. (c) Ante vol. I. 20.

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upon the issue joined upon the replication to the sixth plea. With respect to the issue joined upon the replication to the fifth plea, it has been, very properly, left to us to decide whether the grant pleaded by that plea might not have been presumed; and it has been argued, that the fact of the defendant having persevered in the exercise of a right to sport over the plaintiff's lands, fourteen years after the notice served upon him, without interruption, coupled with a previous exercise of between 30 and 40 years, was a sufficient foundation for presuming such grant. I am, however, of opinion, that the jury would not have been justified upon such evidence in presuming such a grant. We all know that a general, but erroneous idea, was long entertained, that lords of manors were privileged to sport, not only upon their own lands, but upon the lands of other persons lying within their manors. Probably that was the case in the present instance; or it may be, that Mr. *Iremonger's* ancestors, not being themselves addicted to field sports, gave permission to the lord of the manor, as their neighbour, to sport over their lands, not exclusively, but in conjunction with their own friends and tenants; and the mere sporting over land is certainly no injury to the reversion. It seems to me, therefore, that the verdict must be entered for the plaintiff on this issue also.

HOLROYD, J., and LITLEDALE, J., concurred.


Judgment for the plaintiff.

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 HODGKINSON, clerk, and BIRKETT, clerk.

Where the founder of a chapel of ease in the township of A. endowed it with

QUARE impedit. The first count of the declaration stated that *Adam Mort* had, on the 19th *May*, 1630, founded, at his own expense, a certain chapel or house for lands for the maintenance of a chaplain, and by his will directed that his son should, during his life, have the nomination and election of the minister, and might by will or

the public worship of God, on certain land of him the said *Adam Mort*, situate and being in the township of *Astley*, in the parish of *Leigh*, in the county of *Lancaster*; that by his will, reciting amongst other things, that he, the said *Adam Mort*, had built a chapel or house for the public worship and service of God, in *Astley* aforesaid, it being a place far remote from any church, and the inhabitants very ignorant of good things, and that it was his, the said *Adam Mort's* purpose, to make some provision towards the maintenance of a preaching minister in the said township of *Astley*, he devised and bequeathed to the trustees therein named, their heirs and assigns for ever, certain land whereof he was seised in fee, upon trust, after his decease, to apply the profits of the land towards the maintenance of a preaching minister, &c.; and upon this further trust that his son, *Thomas Mort*, should, during his life, have the nomination and election, and likewise power and authority of displacing and removing as he should see cause, the said preaching minister, and likewise might, by his last will or other his deed, in his lifetime, set down the order or course for the nomination and election, displacing and removing of the said preaching minister after his death, and that the same course and order should be from time to time for ever observed and kept; and if it should happen that he the said *T. Mort* should

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deed set down the order or course for the nomination and election of the minister after his death; and in default thereof, then directed that *the minister should be nominated and elected by all the householders or heads of families in the township, and the heirs male of the founder's body, and such other of his kindred or blood as should have any land in the township, or the greater number of them*; and the son not having set down any order or course for the nomination and election of a minister: Held, in quare impedit, First, that the declaration which averred a nomination and election of a minister by the plaintiffs, being the greater number of the householders and heads of families in the township to whom the nomination and election of the minister then belonged, was ill, even after verdict, for not shewing that the heir-male of the founder's body, and such of his kindred or blood as had lands in the township, concurred in the nomination, or that they were in the minority, or that there were no such persons in existence; Second, that the householders or heads of families, &c., had no right to present a curate to the chapel without the consent of the vicar, even though the deed of consecration reserved all the *temporal* rights of the mother church; and Third, that where a chapel of ease has been erected within the time of legal memory, the incumbent of the parish church is entitled to the nomination of the minister, unless there has been a special agreement to the contrary, to which the parson, patron, and ordinary are parties.

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not set down any course or order for the same as aforesaid, then the same preaching minister should be nominated, and elected, and displaced, and removed as occasion should be, from time to time, by *all the householders or heads of families in Astley, and the heirs male of his the said A. Mort's body, and such other of his kindred or blood as should have any lands in Astley, or the greater number of them*, with the advice of some godly ministers near adjoining; and that the voice of such person as for the time being should be the heir male of his, *A. Mort's* body, should be considered as equal to six of the other voices in the election and removal of the said minister. Averment, that *A. Mort* died seised of the land, &c., and that on the 3d August, 1631, the chapel was consecrated by the then bishop of *Chester* to divine worship, for the use of the inhabitants of *Astley*, both then and thereafter; provided that all and singular the ministers or priests, to serve from time to time in the chapel, should be first examined, licensed, and admitted by the bishop and his successors; and that on the 1st January, 1632, *T. Mort* died, without having, by his will or any deed in his lifetime, set down any course or order for the nomination and election of the minister of the chapel after his decease; whereupon the nomination and election of the minister belonged to all the householders, or heads of families in *Astley* aforesaid, and the heirs male of the said *A. Mort's* body, and such other of *A. Mort's* kindred or blood as should have any lands in *Astley* aforesaid, or the greater number of them, with the advice of some godly ministers near adjoining the township of *Astley*. Averment, that the following ministers were nominated and elected by the greater number of the householders and heads of families in *Astley*, and the heirs male of the body of *A. Mort*, or such other of his kindred in blood as then had lands in *Astley*, to whom the nomination and election of the same minister then belonged, with the advice of certain godly ministers near adjoining the said township of *Astley*, and

were duly licensed, examined, and admitted by the bishop; viz., on the 18th October, 1716, *Barrett*, clerk; on the 20th August, 1728, *James Marsh*, clerk; on the 26th February, 1731, *Thomas Mawdsly*, clerk; and that on the 11th June, 1760, the old chapel was taken down and another erected in lieu thereof, and consecrated: that on the 23d February, 1769, *Tillotson* was duly nominated and elected minister of the last-mentioned chapel, by the greater number of the then householders and heads of families in *Astley*, and the heirs male of *A. Mort*, and such other of his kindred or blood as then had lands in *Astley*, to whom the nomination and election of the same minister then belonged, with the advice of certain godly ministers near adjoining *Astley*, and that *Tillotson* was presented to the bishop to be examined, licensed, and admitted; but that *John Barlow*, the vicar of *Leigh*, and divers landowners and inhabitants of *Astley*, usurping upon the greater number of the householders and heads of families in *Astley*, and the heir male of *A. Mort*, and such other of the kindred or blood as then had lands in *Astley*, nominated and elected one *R. Barker* as minister, who was thereupon presented to, and examined, licensed, and admitted by the bishop; that on the 29th April, 1822, the chapel being then vacant by the death of *R. Barker*, one *E. Bowman* was duly nominated and elected minister of the last-mentioned chapel by the plaintiffs, *they the plaintiffs then and there being the greater number of the then householders, and heads of families in Astley, to whom the nomination and election of the same minister then belonged*, with the advice of certain godly ministers near adjoining the township of *Astley*, and which said *E. Bowman* was afterwards, to wit, on, &c., at, &c., presented to the defendant, the bishop of *Chester*, to be examined, licensed, and admitted, who refused so to do. Second count stated the same facts as the first, and alleged that the vicar refused to present *Bowman* to the bishop, and the bishop, after notice of such refusal, refused to examine or admit him, and on

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1825. the contrary licensed and admitted defendant, *Birkett*, as
 FARNWORTH minister of the said chapel. Third and fourth counts like
 and others the first, but omitting the intermediate nominations be-
 u. tween *Barrett* and *Bowman*. Plea, by the bishop, that
 THE BISHOP the said chapel was in the diocese of *Chester*, and that he
 OF CHESTER. had nothing in the said chapel except the licensing of
 and others. ministers to the same chapel, and all such other things as
 belonged to the ordinary, as ordinary of that place. Plea,
 by the defendant, *Hodgkinson*, the vicar, first, that *A. Mort*
 did not declare and devise as alleged in the declaration.
 Second, that *T. Mort* did not die without having, by his
 last will and testament, or any deed in his life-time, set
 down any course or order for the nomination and election
 of the minister of the chapel. Issue on this traverse, and
 special verdict thereon. Third, that *T. Mort*, by deed-poll
 of the 3rd *August*, 1631, (not in defendant's possession,
 and which he therefore cannot produce), granted the chapel
 and resigned and renounced his right to it, to the bishop
 and his successors, with a traverse that *T. Mort* died
 without having by deed, in his life-time, set down any
 order, &c. Issue on this traverse, and special verdict
 thereon. Fourth, that *Barrett*, clerk, was not duly
 nominated and elected minister of the chapel in man-
 ner and form, &c., and issue joined thereon. Fifth, that
James Marsh, clerk, was not duly nominated and elected,
 &c., and issue joined thereon. Sixth, that *T. Mawdsly*,
 clerk, was not duly nominated and elected, &c., and issue
 joined thereon. Seventh, that upon the death of *Mawdsly*,
John Barlow then being vicar of *Leigh*, did duly nominate
 and appoint *Robert Barker*, with a traverse that *Barlow*
 usurped. Eighth, that *T. Mort*, by deed-poll of the 3rd
August, 1631, gave and granted the chapel to the bishop,
 and resigned and renounced his right therein; and that
 defendant, *Hodgkinson*, being vicar of the parish of *Leigh*
 at the time of the vacancy by *Barker's* death, nominated
 and appointed defendant, *Birkett*, as minister. Demurrer
 and joinder in demurrer. Ninth, the same as the eighth

plea, except omitting to state *T. Mort's* deed-poll. Demurrer thereto and joinder therein. Pleas by the defendant, *Birkett*, precisely the same as those by the vicar. Judgment against the bishop, with a cesset executio. At the trial, before the court of Common Pleas for the county palatine of *Lancaster*, the jury found a special verdict, which stated the following facts: that *Adam Mort* did devise as in the declaration was alleged; that *Barrett*, *Marsh*, and *Mawdsly*, were duly nominated and elected ministers of the chapel as in the declaration alleged; that *Thomas Mort*, the son of *Adam Mort*, did after the death of his father make a deed-poll on the 3d *August*, 1631, which recited the building and endowment of the chapel by his father, and that he delivered it up to the bishop to be consecrated, and renounced all title to the same; that the chapel was duly consecrated in 1631, and that it was taken down in 1760 and that a larger one was built on the site, and consecrated on the 11th *June*, 1760. The deed of consecration on that occasion was set out, which stated that the bishop did consecrate, and did grant full power and authority to the ministers licensed to officiate in the chapel, to celebrate divine service therein, to read the public prayers, to expound the Holy Scriptures, preach the word of God, and to administer the holy sacrament, solemnize matrimony, church women, and do and perform all other divine offices which lawfully might be done in other chapels, according to the right and usages of the church of *England*. It further stated, that the chapel yard was consecrated as a cemetery; but that all this was to be "without any prejudice to the mother-church of *Leigh*, and the right and interest thereof, in all privileges, profits, tithes, oblations, obventions, fees, dues, wages, and ecclesiastical emoluments whatsoever, to the vicar, and other minister of the same, for the time being, by law or custom in any wise of right belonging, and also the ordinary right of us and our successors, and the dignity, honour, and jurisdiction of our cathedral church at *Chester*, always

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saved and reserved." It was then found that *T. Mort* did not by his will or any other deed, except by the deed-poll, set down any course or order for the nomination of the minister of the chapel; that on the 23d February, 1769, the ministry became vacant by the death of *Maudsly*; that one *J. Barlow*, the vicar, with *T. Froggott*, and 64 other land-owners, nominated *R. Barker*, with certificate thereof to the bishop, and that he was by the bishop examined, licensed, and admitted, but whether *T. Mort* died without setting down the order for the election, or whether *Barlow*, the vicar, usurped, the jurors aforesaid are ignorant. Judgment was given by the Court below for the defendants, *Hodgkinson* and *Birkett*, on their eight and ninth pleas, but no judgment was given on the special verdict. Error being brought on the judgment of the Court below,


Scarlett now argued the case for the plaintiffs in error. The object of this proceeding is to ascertain whether the right of nomination and presentation of the chapelry of the chapel of *Astley*, is vested in the householders and heads of families in the township of *Astley*, or whether it belongs to the vicar of the parish of *Leigh*, of which that township forms a part; and that is the main question presented on this record. A subordinate question, however, arises on the pleadings themselves, to which it is necessary to direct the attention of the Court in the outset; namely, whether it sufficiently appears on the face of the declaration that the right of nomination belongs to the plaintiffs. The declaration states, that by the will of *Adam Mort*, in case his son *Thomas Mort* should not set down any course or order for the appointment of a minister of the chapel, the right of appointment should be in "all the householders, or heads of families in *Astley*, and the heirs male of his the said *Adam Mort*'s body, and such other of his kindred or blood as should have any lands in *Astley*, or the greater number of them." It appears that from the time of the

death of *Thomas Mort* until the dispute in question, the nomination of a minister has been conformable to this direction; but the present plaintiffs, when they go on to state their nomination, state it in this manner: "On the 29th April, 1822, the chapel being then vacant by the death of *Barker*, one *E. Bowman* was duly nominated and elected minister of the last mentioned chapel by the plaintiffs, they the plaintiffs then and there being the greater number of the then householders and heads of families in *Astley*, to whom the nomination and election of the same minister then belonged." Now the objection which will be taken on the other side, is, that the plaintiffs have not here shewn that the heir male of *Adam Mort*, and his nearest kindred or blood holding lands in *Astley*, concurred, or took any part in the nomination and election. The answer however to this objection is, that after verdict it must be presumed that the plaintiffs proved every thing essential to the maintainance of their title. No issue having been taken on the fact, it must now be assumed, that at the time of the nomination the plaintiffs were the majority of the persons who had a right to take part in the election. The declaration states, that the plaintiffs were the majority of the persons who then had a right to present. They could not have a right to present unless the heirs male of *Adam Mort* and his kindred were extinct, or unless being alive, they were in the minority, and as there is no issue raised upon these facts, they must now be assumed to have been proved. The rule is, that in pleading, where no issue is taken upon the facts stated against a party, if the facts be well pleaded, they are taken to be admitted after verdict. There is a great difference between a writ of right to an advowson, and a quare impedit. In the latter proceeding the party is bound to shew nothing more than that he had a right of presentation at the time he presented; but in the former he must shew on the face of his pleadings, that the right and title to the advowson was actually vested in him. Suppose a meeting to take place of

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the persons having a right to present, the majority would have a right to present for that turn, and if they are hindered it is sufficient for them to shew in quare impedit, that they had a right to present for that turn and were hindered. A quare impedit may be brought by the clerk himself who is nominated, or it may be brought by the person entitled to the particular turn. Suppose a person becomes entitled to the particular turn, in declaring in quare impedit, he is not bound to shew that he is entitled to the advowson; it is sufficient if he shews that he is entitled to that particular turn. Then comes the question, as to who has the right to present. An issue might have been taken on these pleadings, whether the right to present was or was not in the householders and heads of families; but no such issue is here raised. [*Holroyd, J.* Must you not state facts from which it appears that the party presenting has a right to present?—*Bayley, J.* If the allegation had been, that the right belonged to *A.*, *B.*, and *C.* and that *A.*, to whom the nomination *at that time* belonged, presented his clerk, would that have been sufficient without shewing that *A.* and *B.* were dead?] Certainly that is the clearest way of putting the objection, and trying the sufficiency of the allegation on this record. Suppose a right of presentation to be vested in *A.*, *B.*, and *C.* to be exercised by the majority during their lives, and in quare impedit, it was alleged merely that *A.*, to whom the right of nomination *then belonged*, presented, without going on to say that the rest were dead, it is submitted that unless the question were raised on the pleadings, whether the rest were or were not dead, the fact of their death must be presumed after verdict. It must be admitted, that it would have been more satisfactory if their death had been specifically alleged; but there being no issue upon the fact, whether the right of nomination then belonged to the plaintiffs, and the fact being well pleaded, there is ground for the Court to infer on demurrer, that the right of nomination was well vested in the plaintiffs.

ABBOTT, C. J.—We shall not stop the argument on this objection, however clear our opinion may be upon it. We shall hear what may be said upon the great question raised by the demurrer; namely, whether the right of nomination is in the householders or heads of families, and the heirs male of *Adam Mort's* body, and such other of his kindred or blood as should have any lands in *Astley*, or the greater number of them, or whether it belongs to the vicar.

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Scarlett. The general question then is, whether, under the foundation of *Adam Mort*, the right of nomination is vested in the persons whom he appoints, or whether it devolves upon the vicar of *Leigh*. The institution of chapels of ease is of very doubtful origin, but the general foundation on which the right of advowson exists, is perfectly clear. It results from donations to the church, and is so stated in a variety of authorities. But all the authors upon this subject, transcribe their definition of the right of advowson from *Co. Litt.* 119 *b*, where it is said: "Advowsons, so called because the right of presenting to the church was first gained by such as were founders, benefactors, or maintainers of the church; viz. *ratione foundationis*, as where the ancestor was founder of the church; or *ratione donationis*, where he endowed the church; or *ratione fundi*, as where he gave the soil whereupon the church was built." This then being the principle on which the advowson of a parish church is founded, it is submitted, that the same principle is equally applicable to the foundation of a chapel of ease, provided the rights of the parish church are respected. If a chapel is founded in such a way as to detract from the rights of the mother church; if the bishop or patron were to insist upon having a portion of the tithes, or some of the fees of burial, marriage, and baptism given to the chaplain, the rights of the rector or vicar would be invaded; and it is conceded, that wherever their rights are violated, such a foundation could not exist in law without their consent, and even then they could not

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bind their successors without an adequate compensation. This sufficiently explains a distinction to be found in some of the cases, that a chapel of ease which is founded and built within a parish cannot be made presentable by the founder to a stranger, in derogation of the rights of the parish church. And certainly, if from the rector or vicar is taken a portion of his tithes, or his emoluments arising from the personal discharge of his duties, it is but justice that he should have a compensation, and that the compensation should be an adequate consideration to bind his successors; but where care is taken to make proper provision in this respect, it cannot be denied that such a foundation has a legal origin. What then is the case here? The parish of *Leigh* is very extensive, and contains several townships, and consequently the labours of the vicar must be very considerable. The township of *Astley* being large and populous, and there being a difficulty by reason of the distance from the parish church, in having the service administered to the parishioners there residing, Mr. *Adam Mort*, the lord of the manor, from pious motives, builds and endows this chapel, but in doing so he does not pretend to invade the rights of the vicar; and the bishop who consecrates the chapel takes special care that no subject of emolument derivable to the vicar, shall by possibility attach to the chapel. This, then, is simply the case of an endowment of a chapel, not only not derogatory of the vicarial rights, but in ease of his spiritual labours. It is clear, therefore, upon the principle laid down by Lord *Coke*, that the right of presentation belongs to the founder or his appointees. Here is no invasion of the vicar's rights in any respect. [*Bayley, J.* Has not the vicar some spiritual obligations? He has the cure of souls throughout the parish; he has a right to take care what doctrines are propounded to his parishioners. What security has he that a chaplain may not be appointed who preaches improper doctrines?] That is a matter within the jurisdiction of the bishop, and inasmuch as the minister presented must


be licensed, it may reasonably be presumed that the bishop will license no person who does not conform to the established doctrines of religion. It is within his province to inquire into the general character and fitness of the person presented. The founder and his appointees only claim a right of nomination, subject to the control of the bishop, who will not license a person who is improper to be placed in the chapel. Besides, the founder, by the terms of his will, provides that the nomination shall be "with the advice of some godly ministers near adjoining." There are but three decided cases which bear upon this question. The first is the *Attorney General v. Brereton* (a). That was merely a question whether the right of nomination to a chapel in the town of *Flint* was in the vicar of the parish of *Northop* or in the bishop; but in that case there was no claim made by the person who had founded and endowed the chapel, and consequently the doctrine in *Co. Litt.* did not come into question. There may be many chapels founded and endowed, where the founders and donors do not prescribe for any right of patronage, in which cases the vicar may unquestionably have the right of presentation. The case therefore from *Vesey's Reports* is not in point. But the next case of *Herbert v. The Dean and Chapter of Westminster* (b), is a strong authority in the plaintiffs' favour. In that case it appeared, that upon the plague which happened in the year 1625, the church-yard of *St. Margaret's, Westminster*, not being large enough to bury the dead parishioners, the inhabitants of that part of the parish which then resorted to the new chapel built there, petitioned the dean and chapter of *Westminster*, (who were lords of the manor), to grant them a waste piece of ground to bury their dead, which accordingly the dean and chapter did, under their seals, and it was solemnly consecrated; afterwards, these inhabitants were at the charge of building a chapel there, having first obtained a royal license for that purpose. The vestry-men and chapel-wardens had ever

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(b) 1 P. Wms. 773.

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since the year 1653 elected the ministers who were to preach there ; but now the dean and chapter of *Westminster* claimed right to name the minister who should preach and do divine service in this chapel. On a bill brought to settle the right of nominating the parson of this chapel, Lord *Macclesfield*, chancellor, delivered his judgment, and his reasoning is strongly in favour of the present plaintiffs. He said : “ When the dean and chapter gave this ground, they did not reserve any power to nominate the preacher ; and the inhabitants of the chapelry were at the expense of building the chapel. Now the building and endowing of the church, was what at common law originally entitled the patron to the patronage ; here the inhabitants built the chapel, and by the pew-money have endowed it. It is not reasonable to say, that the dean and chapter, as parson appropriate, have a right to supply every chapel built within the parish with a preacher, it would be an expense and hardship upon them to be obliged so to do ; neither ought it to be at their election to supply it. For suppose I build a chapel in my house for myself, the parson is not bound to provide for it ; or suppose I build a chapel in my house for myself or my next neighbour, can the parson name one to preach there ? I think not ; and it will make no alteration, if the chapel which I build on my own ground, be intended for the use of twenty neighbours besides my own family.” This reasoning is strongly applicable to the present case. Here *Adam Mort* granted land to build a chapel. The plaintiffs now on record are his appointees ; and they have the right of patronage upon the principle laid down in *Co. Litt.*, which is expressly recognized in the case cited. It is true that in the report of that case it is stated, that afterwards on the hearing, the Court decreed that the right of nomination of the minister did belong to the dean and chapter. No reasons are stated for that determination, but it must have been on the ground that the dean and chapter being owners of the land on which the chapel was built, they were by the common law the real patrons of the

chapel, and consequently the right of nomination was in them, they having no power of alienation as exercised by private persons. The next case is *Dixon v. Kershaw* (a), which will probably be relied upon on the other side, but the grounds on which it was decided will be found not inconsistent with the principle on which this case must depend. In that case it appeared, that in 1653 the lord and lady of the manor of *Armley*, and several freeholders of the manor, conveyed to trustees a part of the waste in trust to employ the profits thereof for the use of the chapel of *Armley*, and for payment of the annual sum of 27*l.* to the minister officiating there from time to time. By another indenture, in 1657, the lord and lady of the manor and other freeholders granted to trustees the land on which the chapel was built, to the intent that the chapel should for ever be used as a chapel, and as a place for the minister of *Armley* and his successors to officiate. In 1674, upon the petition of the inhabitants of *Armley* and *Wortley*, the archbishop of *York* consecrated the chapel, and in the instrument of consecration *took upon himself* to grant the nomination of a minister to officiate there, to the inhabitants of *Armley* and *Wortley*, and reserved to himself and his successors the right of lapse. It appeared in evidence that the vicar of *Leeds* was present at the consecration by the archbishop, and declared, that he, as vicar, had no right to nominate a curate to the chapel. The inhabitants of *Armley* and *Wortley*, from the time of the consecration, always repaired the chapel at their own expense, and had elected the minister or curate who was to officiate there, as often as a vacancy had happened, which was four times since the consecration, and the minister so elected had been constantly licensed and officiated. In 1761 the chapel became vacant by the death of the last curate, and in that year the inhabitants met and elected the plaintiff, and soon afterwards *Kershaw*, the vicar of the mother-church of *Leeds* nominated and appointed *Metcalf* to be curate.

(a) Amb. 528. S. C. 2 Eden. 360, by the name of *Dixon v. Metcalf*.


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of the chapel. After argument, Lord Chancellor *Northington* held, that the vicar was entitled to nominate; and he could not have held otherwise, for there was nobody claiming there on behalf of the donors of the land, nor had they conveyed the right of nomination to any body else. It was clear that the inhabitants had no colour of right, for the instrument of consecration by which the archbishop took upon himself to grant the nomination to them was quoad hoc, absolutely void. The decision in that case therefore is not inconsistent with the ground on which the present case stands, namely, that there the founders or donors never made any claim themselves, consequently at common law the right of nomination was in the vicar; but here the circumstances are totally different. Wherever a chapel is built with the consent of the ordinary and incumbent, being founded and endowed by a private donor, without any invasion of the temporal rights of the vicar, the founder has the right of patronage, unless it appears that he has expressly relinquished it in favour of the vicar. It is on this principle that these plaintiffs are entitled to recover in this proceeding. [*Bayley, J.* You must argue, that if I were to found and endow a chapel, I and my heirs would have a right to appoint the chaplain, and therefore that I could force upon a rector or vicar, without his concurrence, somebody who would preach and do all the offices of a minister, within certain limits of the parish, only taking care not to trench upon the temporal profits of the mother church]. There are many noblemen and gentlemen who have chapels in their own houses, and the right of appointing their own chaplains is unquestionable. If then a man may build a chapel in his own house for his own use, and appoint his own chaplain, why may he not do so for himself and a dozen, or even a thousand of his neighbours? It cannot be supposed that the bishop would license such a chapel, if it invaded the rights of the mother church; but if care is taken that it shall not have that effect, then there can be no reason for refusing a

license. The present case does not stand alone; and the decision of it will be of great importance in many other similar cases. If it be laid down as a general rule, that a man may not found a chapel, and appoint a curate, without prejudice to the temporal rights of the vicar, it will give rise to a great number of inquiries in cases in which the doctrine laid down by Lord Coke has prevailed.

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Tindal contrà was stopped by the Court.

ABBOTT, C. J.—I am very clearly of opinion, that the objection taken to the declaration, namely, the want of an allegation, that this nomination was made at a meeting at which the heir and kindred of *Adam Mort* were present, (no reason being assigned for their absence), is of itself a sufficient objection to the plaintiff's right of recovering; and upon that ground alone, if there were no other, the judgment of the Court below ought to be affirmed. But as the affirmance of the judgment on that ground alone might still leave open a door to future litigation and expense, and as it is exceedingly desirable that that result should be avoided in a case of this kind, wherein disputes and litigation are of the most mischievous consequence, by creating dissensions between the minister and his parishioners, I thought it right to hear what counsel had to urge as to the right of any class of persons claiming under the will of *Adam Mort*, or under *Thomas Mort*, to present a curate to this chapel, without the assent of the vicar. I have always understood it to be a general rule of law, that no person can be appointed to preach publicly in a chapel, to which all the inhabitants of a district may have a right to resort, without the consent of the vicar, to whom the cure of souls generally is by law entrusted. I do not speak of a private chapel, erected in a gentleman's house for the use of his own family only, but of a public chapel, open to all the inhabitants of a certain district. That there are modes in which this may be done has never

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been disputed. Wherever there has been an endowment of a chapel beyond the time of legal memory, and the presentation has gone all along in a particular course, we must presume that course to have been according to the will and pleasure of the founder; and we must presume, in the case of a prescription, every thing necessary to give effect to that which has for so long a period been done. In such a case, we must presume the consent not only of the vicar or rector, given in his own time, but of the patron and ordinary. According to the doctrine laid down by Lord *Northington*, in *Dixon v. Kershaw*, a mere arbitrary agreement made, even with the consent of the parson, patron, and ordinary, without a compensation to the incumbent of the mother church, will not be sufficient, and cannot be supported. Perhaps that expression requires some qualification; for, where nothing is taken from the income of the incumbent, the consent of the parson, patron, and ordinary, without a compensation, may be quite sufficient. But still the doctrine of Lord *Northington*, and which appears to have been the foundation of his decision, is distinctly this, that it is undoubted law, that wherever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary, to which parson, patron, and ordinary, are parties. In the present case there is no special agreement to the contrary, to which parson, patron, and ordinary, are parties; and in the absence of such agreement, it appears to me, that no person can have a right to allow another, although he be licensed by the bishop, to officiate in a public chapel erected for the ease of a portion of the inhabitants of the parish, without the consent of the vicar. It is not necessary, in this case, to decide that the vicar has the right of nomination; it is sufficient for us to say that these persons cannot have the right without the consent of the vicar; and his consent, as appears by the record, they could not obtain. On this short ground, without adverting to the

other cases, I think the judgment of the Court below must be affirmed. I would observe, however, with respect to the case in *Peere Williams*, though seemingly, perhaps, to be contrary to our present decision, yet I think if the facts were well ascertained, it would probably be found not to be so; for I think Dr. *Broderick*, being the vicar at the time, assented to the right then claimed by the dean and chapter of *Westminster*. That case, therefore, being distinguishable from this in that respect, and from *Dixon v. Kershaw*, which is the last upon this subject, and the law being there laid down distinctly by the Lord Chancellor in a manner conformably with what I have always understood to be the general rule as to the right of the vicar, that you shall not enable any person to preach in his parish without his consent, unless under special circumstances, which do not exist in this present case, I think the plaintiffs have not shewn any right to present, and consequently the judgment of the Court below must be affirmed.

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BAYLEY, J.—It is much more satisfactory that this case should be decided on the merits than upon any defect of form existing in the pleadings. My opinion is founded upon the principle, that the endowment of this chapel in the manner in which it was endowed, and the mere consecration by the bishop, without the concurrence of the then incumbent and the patron of the living of the parish, did not give the inhabitants, or the persons named by the founder, such an interest in this chapel as entitled them to present a person to hold the chapel for his own life, and bring a quare impedit in respect of it. I am not aware of any case in which a quare impedit was brought on a presentation to a chapel of this description. In the case of a chapel founded by the king's license it has been brought; but beyond that I am not aware of any case similar to the present. My opinion, however, is founded on this general position, "that you have no right without the concurrence

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of the patron and incumbent, to interfere either with the temporal rights or the spiritual obligations of the vicar."

Mr. *Scarlett* admits that if you were to interfere with the temporal rights of the vicar, the claim of a right of nomination arising from the endowment could not be supported, and that the right of nomination would not result from the endowment; but he contended, that interfering with the spiritual obligations of the vicar did not stand on the same footing. It appears to me, however, that in principle, the temporal and spiritual rights of the vicar stand on the same foundation. He has the cure of souls co-extensively with the whole bounds of his parish. That casts a serious and important duty upon him, and he has a right, as it seems to me, as the organ parochiæ, to take care that no person shall deliver doctrines in that parish without his concurrence, sanction, and authority. It is said that the bishop will never license an unfit person; but if the vicar has the cure of souls in the parish, he has a right to act upon his own judgment, and he is not bound to trust to the judgment of the ordinary. Whether the vicar is bound to put in a person who is to hold for life or not, may be another very important and material question. It may turn out, that although the chapel be endowed, yet the vicar would be entitled to put a person in, not for the period of his whole life, inasmuch as age and infirmities might incapacitate him from discharging his duties, but from time to time to put a person in possession of that place who should be there only for such a period as his doctrines and conduct should be agreeable to the judgment of the vicar, and so long as the vicar should be satisfied of his competency to discharge the duties of the office. Allowing the quare impedit to be brought in the names of those persons to whom the founder has given the right of nomination, (if the founder could give any such right), entirely supersedes all judgment of the vicar in that respect, and ties down him and his successors during the whole period of the life of the person who may have been originally

nominated. It seems to me, that looking to the spiritual obligations of the vicar of the parish in which he is placed, no person can have a right, by law, to force upon him a chapel in that parish, any particular individual. If we were tied down by authorities to the contrary, we should of course have acquiesced in those authorities, and have acted accordingly; but there are none. In the case of *Herbert v. The Dean and Chapter of Westminster*, the question was, in whom the right of nomination was to be; but whether that nomination was to be for the whole life of the nominee does not appear to have been made a question. It might, and ought in a variety of cases to be made a question, whether the party is to be nominated for his whole life, or nominated and placed there by the vicar so long as the vicar in his judgment should think him a fit person, the vicar being the proper authority to decide upon his fitness. The result of a decision in favour of the plaintiffs in this case, would be this, that wherever a person now should think fit to build and endow a chapel of ease on his own land, and could prevail upon the bishop to consecrate it, that would for all future time be binding on the rector or the vicar of the parish in which it was erected, and secure to the founder, and his heirs, if he reserved it to himself by the deed of endowment, the right to put in such person from time to time as he should think fit. It seems to me that the general rights of the vicar are inconsistent with such a notion, and it is upon that ground that my opinion is founded. The case of *Dixon v. Metcalfe* does admit of the distinction which Mr. Scarlett has made between that case and this, because there the persons who claimed the appointment did not found their claim on the gift of the founder, but on the deed of consecration by the bishop. But Lord Northington does not decide that case merely upon the want of title in the inhabitants; he puts it on three grounds: first, on the want of legal title in the clerk presented by the inhabitants; second, on the want of equity; and thirdly,

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on the usurpation of the rights of the vicar. I think the latter objection exists in this case, and I am of opinion that the effect of this quare impedit would be to trench on his rights in a way which the law will not uphold. We have no occasion to decide whether the vicar has a right to present, or whether he is bound to nominate for life, because there is no prayer of a writ to the bishop in the plaintiffs' plea; and it becomes no part of the judgment, that a writ to the bishop to admit the defendant's clerk should issue.

HOLROYD, J.—I am also of opinion that the judgment of the Court below must be affirmed. Without considering whether the writ of quare impedit is or is not the proper remedy in this case, I think the record is defective on both the grounds on which the opinion of the Court is founded. I take it to be perfectly clear with regard to the first objection, that the mere allegation that the right belonged to the plaintiffs at the time they made the nomination, is not sufficient. The parties must shew the facts and circumstances out of which the right which they allege to exist in the persons making the nomination arises, in order that it may appear from those facts and circumstances whether they have or have not that right. It appears from the statement in the declaration itself, that the right did not exist exclusively in the persons presenting, at the time the nomination took place, but that others as well as themselves had a right to join in the presentment, unless some circumstances existed, which are not stated, in order to shew that the right was duly exercised by the persons who are stated to have made the nomination. That, of itself, is a complete answer to this action. But I think likewise, on the other ground, that the right of nomination to this, as a public chapel, is not in the persons who made the nomination, even assuming that the formal objection was not in the way; that there is nothing to shew that the heir male of the

kindred of *Adam Mort* bore a part in the nomination. This is very distinguishable from the case of a private gentleman's chapel, or the chapel of a person building it on his own property, and in respect of which public rights have not been superinduced ; but the dedication of this chapel for the use of a particular township of this parish, gives the parishioners a right to resort to it, and when the minister is appointed agreeably to the consecration, it gives him a right of continuance, which is very different from a private chapel, where the chaplain is appointed by the owner, merely to perform divine service. By that appointment he acquires no freehold interest, and he may be displaced whenever the owner chooses to discontinue his services. In such a case, although the owner of the chapel permits a particular individual to enter it, yet that would not by any means give him a right to continue so to do. In the present case, the chapel is consecrated, and dedicated to a large portion of the parish, and therefore upon the authority of the cases referred to, particularly that decided by Lord *Northington*, we must hold, independently of the formal objection, that this *quare impedit* cannot be maintained, even supposing that one would lie for a chapel of this description.

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[LITTLEDALE, J., having been of counsel in the case, when at the bar, took no part in the judgment].

Judgment affirmed.

It being stated in the special verdict, (p. 61), that *Thomas Mort*, after the death of his father, made a deed-poll, on the 3d *August*, 1631, by which he renounced all title to the chapel, one question intended to be raised was, as to the effect of that deed ; but the Court, in the course of the argument, expressed a decided opinion, that it operated to vest the chapel in the bishop, merely for the purpose of consecration, and that it did not affect the right of nomination.

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Where a testator, being seised in fee of gavelkind lands, devised all his "real estate" to his nephew T. C. for life; remainder to trustees to preserve contingent remainders; remainder to "the heirs of the body of T. C., as well female as male lawfully to be begotten, such heirs, as well female as male to take as tenants in common, and not as joint tenants, and for default of such issue;" remainder to trustees for a term of 500 years, to raise 300*l.* for testator's niece A. C.; remainder to testator's two nephews J. C. and C. C., for and during their respective natural lives, as tenants in common and

THIS was an ejectment for certain premises situate in the parish of *Cowden*, in the county of *Kent*. On special verdict found at the summer assizes, 1824, for the county of *Kent*, before *Graham, B.*, the case was this:—


Nicholas Chapman being seised in fee of three undivided fourth parts of certain lands, messuages and premises, at *Cowden*, in the county of *Kent*, and of three undivided fourth parts of a moiety of the manor of *Cowden*, which were respectively of the tenure of gavelkind, made and published his last will and testament in writing, bearing date 16th *February*, 1763, which was executed so as to pass real estates, and thereby devised as follows, (after giving several pecuniary legacies): "Also I give and devise all other my manors, messuages, or tenements, houses, buildings, lands, hereditaments, and real estate, whatsoever and wheresoever, subject, nevertheless, and liable to the payment of so much money as my personal estate shall fall short of, or be deficient in paying my debts and legacies, unto my said nephew *Thomas Chapman*, for and during the term of his natural life. And from and after the determination of that estate, I give and devise the same unto *Thomas Richardson* and *Nicholas Lock*, and their heirs, during the life of the said *Thomas Chapman*, to the intent to preserve and support the contingent uses and remainders hereinafter limited; but nevertheless, in trust, to permit my said nephew *Thomas Chapman* to receive the rents and profits thereof during his natural life; and from and after the decease of my said

not as joint tenants, and after their respective deceases, to all and every the heirs of their respective bodies, as well female as male, such heirs to take in common and not as joint tenants, and for default of such issue, remainder over to testator's own right heirs for ever:—Held, that the words "*heirs of the body*," were to be construed as words of limitation, and not of purchase, and consequently that *T. C.* took an estate in tail general.

nephew, *Thomas Chapman*, then I give and devise the same to and amongst all and every *the heirs of the body of the said Thomas Chapman, as well female as male, lawfully to be begotten, such heirs as well female as male to take as tenants in common, and not as joint tenants, and for default of such issue,** I give and devise the same premises unto the said *Thomas Richardson* and *Nicholas Lock*, and the survivor of them, his heirs and assigns, for and during the term of 500 years, upon trust, that they the said *Thomas Richardson* and *Nicholas Lock*, shall and do as soon as conveniently may be after the decease of the said *Thomas Chapman*, in case he shall die without issue of his body lawfully to be begotten, but not otherwise, raise thereout, either by sale or mortgage as they shall think fit, the sum of 300*l.*, of lawful money of *Great Britain*, and place the same out at interest, on government or other securities, and pay and apply the whole or such part of the interest or produce thereof, as they, or the survivors of them shall think proper, towards the maintenance and education of my niece *Ann Chapman*, sister of my said nephew *Thomas Chapman*, until she attains her age of 21 years, in case the said *Thomas Chapman* shall happen to die without issue, before she attains the age of 21 years. And when she shall have attained her said age of 21, then, and in case of the death of the said *Thomas Chapman* without any lawful issue as aforesaid, I give and bequeath the same 300*l.*, together with all such interest or produce thereof as shall not have been applied for the purposes aforesaid, unto her my said niece; and from and after the expiration, or otherwise sooner determination of the said term of 500 years, and subject thereto,* I give and devise the same unto my said two nephews, *James Chapman* and *Charles Chapman*, for and during their respective natural lives, which nephews are to take as tenants in common, and not as joint tenants. And from and immediately after their respective deceases, I give and devise the same premises unto and amongst all and every the heirs of the respective bodies of the said *James Chapman*

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and *Charles Chapman*, as well female as male, lawfully begotten, such heirs to take in common and not as joint tenants; and for want and default of such issue, I give and devise the same premises unto my own right heirs for ever." After disposing of other parts of his personal estate, the testator appointed *Richardson* and *Lock* his executors. The following facts were then stated in the special verdict: The death of the testator, and entry of *Thomas Chapman*; his death in 1789, without having suffered any recovery or levied a fine; that he left six sons and two daughters him surviving, namely, *James Chapman*, *Henry Chapman*, *William Chapman*, *Charles Chapman*, *Nicholas Chapman*, *George Chapman*, *Sarah Chapman*, and *Mary Chapman*. In 1809, *Sarah Chapman* intermarried with *John Bagnall*, who died in 1817. In 1788, *Mary Chapman* intermarried with *John Mann*, who died in 1789, and afterwards intermarried with *Charles Mann*, who died in 1821. The said *Sarah Bagnall* and *Mary Mann*, the daughters of *Thomas Chapman*, are the lessors of the plaintiff. *James Chapman*, one of the brothers, died in 1792, a bachelor, without having levied a fine or suffered a recovery. *Henry Chapman* and *William Chapman* also died without levying a fine or suffering a recovery, but each of them left a son. *Charles Chapman* and *Nicholas Chapman* and *George Chapman* conveyed their interest in the devised premises to the defendant, (which in the deeds of conveyance was stated to be four-fifths), and covenanted that the infant sons of their deceased brothers should, as soon as they came of age, convey the other fifth. The present ejectment was brought to recover two-eighth parts of the land, on the ground that *Thomas Chapman*, the first taker, had an estate for life only, and that his children took as tenants in common; and the question for the opinion of the Court is, whether the lessors of the plaintiff are entitled to recover.

Abraham, for the lessors of the plaintiff. It is submitted

upon the sound construction of this will, that *Thomas Chapman*, the first taker, had only a life estate, and that his children took an estate tail by purchase, and consequently the lessors of the plaintiff are entitled to recover the portions of the estate which are the subject of this ejectment. The testator devises his estates to his nephew *Thomas Chapman* for and during the term of his natural life, and from and after his decease, he gives them to and amongst all and every the *heirs of the body* of *Thomas Chapman*, as well female as male. Now the words "heirs of the body" following the gift to the first taker, are to be construed as words of *purchase*, and not of *limitation*. In opposition to this construction, the rule in *Shelley's* case (*a*) will probably be relied on by the other side. Looking however at the particular intent manifest on the face of this will, which was to give *Thomas Chapman* a life estate only, that rule will not apply. The rule there laid down is, that when an estate of freehold is given to the ancestor, by deed of conveyance, and in the same deed the estate is limited either mediately or immediately to his heirs, or the *heirs of his body*, the word *heirs* is construed as a word of limitation of the estate, and not of purchase. Undoubtedly that rule would apply here, if the particular intent of the testator were not obvious, so as to take this case out of its operation. But it remains to be considered, whether the word "heirs" so unites with the preceding life estate, as to render the rule in *Shelley's* case so absolutely inflexible as never to yield to circumstances. Undoubtedly, Mr. *Fearne* in his Essay on Contingent Remainders (*b*), after collecting and commenting on the various authorities on this point, draws this conclusion from them, that wherever it appears to be the testator's general intent, that all the heirs of the body of the tenant for life should inherit, the particular intent is disregarded; and in order to give effect to the general intent, the words "heirs of the body" have been held to be words of limitation,

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(a) 1 Rep. 93.

(b) Chap. 1, s. 5.

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and the ancestor to whom the freehold is given takes an estate tail, which may possibly let in all the heirs of the body in succession. Admitting that to be the general rule, still wherever the particular intent is manifestly at variance with the general intent, the latter yields to the former. Here it appears, from the whole frame of the will, that the testator intended to give his nephew *Thomas Chapman* an estate for life only; and therefore, notwithstanding the devise to the heirs of his body, the devise must be construed so as to give effect to the particular intention. For this *Leonard v. The Earl of Sussex* (a), and *Papillon v. Voice* (b), are authorities. [*Bayley, J.* Those were cases in equity, and a court of Equity moulds the construction of the will according to what the testator might have intended]. But even at common law it has been held, that if after the devise to the heirs of the body, subsequent words are ingrafted thereon inconsistent with the nature of the descent implied by the first words, then the words "heirs of the body" are to be construed as words not of limitation but of purchase, *Doe d. Long v. Laming* (c). There the devise was of lands in gavelkind to "*Anne, now wife of William Cornish, and to the heirs of her body lawfully begotten or to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common, and not as joint tenants.*" The Court there said, that there was no such fixed and invariable rule, as had been supposed, that words of limitation shall *never* in any case be construed as words of purchase; and in construing that devise, they held that "the heirs of the body" of *Anne Cornish* must take as purchasers, and that the devise could not take effect at all, but must be absolutely void unless the heirs of her body so took. It was manifest, they said, that the testator did not mean that the land should go in a course of descent in gavelkind, for he gave it to the heirs of her body *as well females as males*; and mentioned *females*, not only expressly

(a) 2 Vern. 526.

(b) 2 P. Wms. 471.

(c) 2 Burr. 1100.

and particularly, but even prior to males. Therefore they could not take otherwise than as purchasers. It would be a void devise, if the words were to be construed as words of limitation; for he broke the gavelkind descent by giving it to *females* as well as males. It could not descend to females as well as males by the rules of gavelkind; and yet the testator seemed to lay the chief stress upon the word "females," and he added "to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common, and not as joint tenants;" but this could not be if they were to take in the course of gavelkind descent; for in such case they must take as coparceners. The Court there also relied upon the manifest intention of the testator, which is the polar star for the direction of devises. Now that case is similar to this in almost all its circumstances. Here, as there, the land is gavelkind, and the language of the devise is nearly in the same terms. The only difference is, that here the words "their heirs and assigns for ever" are omitted; but the ground of the decision is precisely applicable, namely, that the words "heirs of the body" were expressly qualified and explained to mean females as well as males. It follows then from that case, that as females cannot, by the tenure of gavelkind, take by descent, the word "females" must be construed as a designation of the individual persons who were to take after the death of the first devisee. The case of *Goodtitle v. Herring* (a), is an authority to shew that the rule in *Shelley's* case does not extend to cases where words "heirs of the body" may be explained by the words of the will, to mean "first, second, third, and other sons." That was a devise to *Margaret* the wife of *C. Davie*, and her assigns, during her natural life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs male of the body of *Margaret Davie* to be begotten, severally, successively, and in remainder, one after another, according to seniority of age and priority

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of birth, the elder of such sons and the heirs male of his body being always preferred before the younger of such son and sons, and the heirs male of their bodies, and in default of such issue, to the daughter and daughters of the body of *Margaret Davie* as tenants in common in tail; remainder over; and it was held, that *Margaret Davie* only took an estate for life, and that the words *heirs male of her body* were explained by the subsequent words to mean "first and other sons." [*Bayley, J.* You contend that the words "*heirs of the body*," are equivalent to "*children*"]. It is contended, that they are not to be taken in their technical sense, but as descriptive of the particular persons who are to take, and without so holding it is impossible to give effect to the intention of the testator. The words "*heirs of the body*," are here explained by the words, "as well female as male." It is clear that the testator meant that the females should take as well as the males, and this can only be done, by construing the words, "*heirs of the body*" as words of purchase. [*Bayley, J.* If this is an estate tail in *Thomas Chapman*, then his sons would take as heirs in gavelkind, and upon the death of all the sons, then the daughters would take as heirs in gavelkind in coparcenery]. But it is submitted that the females must take equally with the males; for if the words, "*heirs of the body*," are to be construed as giving an estate tail to *Thomas Chapman*, the estate tail might never be determined, or it might be postponed indefinitely. The true construction of this will is, not that the daughters are to wait until there is an expenditure of the males and their issue, but that they are to take equally with the males. [*Littledale, J.* The daughters may take by way of representation, if they take regularly as heirs of the body. The word "*female*" as used in this will, does not necessarily import a word of purchase. The females may take as representing their father; that is, the daughters of the males.—*Bayley, J.* Suppose one of *Thomas Chapman's* sons died, leaving a daughter, she would be one of the heirs of the

body, to satisfy the meaning of the will. Or put it this way; suppose *Thomas Chapman* had six sons, three of whom died in the life-time of the testator, leaving each a daughter, that would satisfy the words "female as well as male," and then the remaining sons, and the three grand-daughters would be all "heirs of the body." In this sense, the persons whom you represent are not heirs of the body. This explains what is said by my brother *Littledale*. If one of the sons of *Thomas Chapman* died during the life-time of the testator, leaving a daughter, that daughter would take by representation. In this view, the present lessors of the plaintiff are not "heirs of the body]." This construction would be defeating the intention of the testator, who was clearly not contemplating grand-daughters by the use of the words "females as well as males;" but "daughters as well as sons," who were to take *pari passu*. [*Littledale J.* But you are assuming that *females* necessarily meant the daughters of *Thomas Chapman*. Now that does not necessarily follow, for the daughters of his sons would equally satisfy the words]. The more natural construction of the word "female," as here used, and certainly the most applicable, is that the daughters as well as the sons of *Thomas Chapman* are to take equally. This very will was before the Court on the 22d April, 1816 (a), on a special case, when Lord *Ellenborough*, *Bayley, J.*, and *Holroyd, J.*, were of opinion that *Thomas Chapman* took an estate for life, and that his children took a fee under the devise of "all the testator's real estate."

Polson, for the defendant. This case must be governed by the general rule laid down in *Doe d. Wright v. Jesson* (b), the doctrine of which goes expressly to shew that *Thomas Chapman* took an estate tail. There the devise was to *William Wright* for life, and after his decease, to the heirs of his body, in such shares and proportions as *William*

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(a) *Doe d. Chapman v. Covell*, Easter T. 1816. Not reported.

(b) 2 Bligh. P. C. 2.

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Wright by deed should appoint: and for want of such appointment, to the heirs of the body of *William Wright*, share and share alike, as tenants in common, and if but one child, the whole to such only child; and for want of such issue, to the heirs of the devisor. After argument upon that case, this Court held that *William Wright* and his children took estates for life only; and one of the reasons for that determination was, that a tenancy in common was inconsistent with the supposition that the heirs of the body were to take as tenants in tail by descent, because one would take the whole. The case being afterwards brought before the House of Lords, the judgment of this Court was reversed, the House being of opinion, that *William Wright* took an estate tail, and the grounds of that decision are expressly in point with the present case. Immediately after the argument, Lord *Eldon* said, "the words *heirs of the body*, *primâ facie*, mean all descendants; and it is a rule of law, that all descendants should take under these words, unless they are clearly qualified and restricted by other words, so as to give them a more limited sense." The same learned Lord, in moving afterwards to reverse the judgment of the King's Bench, said, "it was a general rule of law to be collected from a consideration of all the cases, "that where there is a particular, and a general, or paramount intent, the latter shall prevail, and courts are bound to give effect to the paramount intent." After stating the first devise to *William Wright* for life, he says, "If we stop here, it is clear that the testator intended to give *William Wright* an interest for life only." And after reciting the devise to the heirs of the body of *William*, he says, "If we stop there, notwithstanding he had before given an estate expressly to *William* for his natural life only, it is clear that by the effect of these following words he would be tenant in tail; and, in order to cut down this estate tail, it is absolutely necessary that a particular intent should be found to control and alter it, as clear as the general intent here expressed. The words "heirs of

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the body," will, indeed, yield to a clear particular intent that the estate should be only for life; and that may be from the effect of superadded words, or any expressions shewing the particular intent of the testator; but that must be clear, intelligible, and unequivocal." Now what is said in that case must be the basis of the argument in this. Looking at the frame of this will, there is nothing to shew that *children*, and *children* alone, should take. The limitation is to *Thomas Chapman* for his life. It then goes to limit the determination of that estate to trustees, to support contingent remainders; and then it devises the same to and amongst all and every *the heirs of the body of Thomas Chapman, as well female as male*. There is nothing here to limit the general intent, or to do away the technical meaning of the words "heirs of the body." It is argued on the other side, that the words "as well female as male," must necessarily mean "children," because the word "female" happens to be put before "male." But that is not the fair inference from the words. The more reasonable construction is, that the testator by designating females as well as males, meant that the estate should go, not in tail male, but that both descriptions of descendants should be entitled. The general intent is, that all the descendants of *Thomas Chapman* shall take; and according to the doctrine in *Doe v. Jesson*, that intent must prevail, unless there be a contrary particular intent clearly and unequivocally expressed. Here there is no clear and unequivocal expression of a contrary particular intent, therefore the words "heirs of the body" must have their legal operation so as to give *Thomas Chapman* an estate tail. The testator says that they are "to take as tenants in common, and not as joint tenants." Some stress is laid upon these words, and it is said that "heirs of the body" must be construed as words of purchase; in the first place, because *heirs of the body* cannot take as tenants in common; and in the second, because these being lands in gavelkind, females cannot take by

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descent as tenants in common, but must take as coparceners, and for this *Doe v. Laming* is cited. Now assuming that these words are to have any operation, still they cannot prevent the operation of the technical rule applicable to the words "heirs of the body." But there is one feature in *Doe v. Laming*, which makes a material difference between this case and that. In that case, the person whose "heirs of the body" were to take, died in the lifetime of the testator, and consequently, ex necessitate, those words must in that case have been words of purchase. In that case also there was no limitation over. Besides, the case of *Doe v. Laming* has since been repeatedly shaken, and certainly it is no authority to govern the present case. The case of *Goodtitle v. Herring*, is perfectly consistent with all the other cases upon this subject. There the words "heirs of the body" did not stand alone, but were explained by other words sufficiently explanatory of the testator's particular intent, to which the Court was bound to give effect. It is however now a general rule, settled by a variety of authorities, that a particular intent must give way to a general intent, unless there are unequivocal words to the contrary, *Robinson v. Robinson* (a), *Doe v. Aplin* (b), *Doe v. Smith* (c), *Doe v. Cooper* (d), *Frank v. Stovin* (e), *Pierson v. Vickers* (f), and *Murthwaite v. Jenkinson* (g). The Court has already given a satisfactory answer to the argument arising from the use of the words, "as well female as male," by shewing that the word "female" may be satisfied as applying to the daughters as well as sons of *Thomas Chapman's sons*, and consequently that the daughters might take by representation. But giving every possible effect to the words following "heirs of the body," still they would not over-rule these latter words, which have a settled technical meaning; and the observations of Lord *Redesdale*, in *Doe v. Jesson*, are quite decisive

(a) 1 Burr. 38. 3 Bro. P. C. 180.

(b) 4 T. R. 82.


(c) 7 T. R. 531.

(d) 1 East, 229.

(e) 3 East, 548.

(f) 5 East, 548. (g) Ante, vol. iii. 764. 2 B. & C. 357, S. C.

in order to remove the supposed difficulty arising from the words “as well female as male, to take as tenants in common, and not as joint tenants,” for that learned Lord there said, “it did not follow that *heirs of the body* should not take, because they could not take in the mode prescribed; this only follows, that having given to *heirs of the body*, the testator could not modify that gift in the two different ways which he desired, and the words of modification are to be rejected.” So here the words of modification must be rejected, in order to give full effect to the technical meaning of the words, “heirs of the body.” [Here the Court stopped him].

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ABBOTT, C. J.—Taking what is said by my Lord *Eldon*, and my Lord *Redesdale* in *Doe v. Jesson*, to be the general rule, I should say in the present case, that the words, “heirs of the body,” must have their legal effect, because nothing which follows appears to be sufficiently strong to control their operation, or convert them into words of purchase. It is manifest, on the face of this will, that the general intent of the testator was, that the whole of his estate should be in the family of his nephew, *Thomas Chapman*, so long as that family existed; and when there should be an entire failure of the family, then it was to go over. That was clearly the general intent; and the only way in which it can be effectuated, is to construe the words “heirs of the body” as words of limitation, and not of purchase. If we construe them as words of limitation, then *Thomas Chapman* takes an estate tail; and the estate may descend to heirs female as well as male. It is true that if this be so, those who come after him will not take by descent *as tenants in common*, the land being in gavel-kind, but then we must not infer, because the heirs of the body cannot take in the particular mode prescribed by the testator, that he intended they should take nothing. If, however, we construe the words “heirs of the body,” as words of purchase, it is obvious that the general intent of

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the testator must be defeated. It is not contended that they can be carried beyond "children," and if so, then it is very difficult to say, (there being no words superadded to shew a different intent), that the children of *Thomas Chapman* can take more than an estate for life. If then they only take an estate for life, what becomes of the estate after all the children of *Thomas Chapman* have died? The effect of such a construction would be, that upon the death of all the children, the estate would go to such person as might then happen to be the heir at law of the testator,—a son or daughter, or sons or daughters, or perhaps more distant relatives. So that if such be the construction, there would be an end at once to all the limitations in favour of *Thomas Chapman and his family*. If, on the other hand, the heirs of the body of *Thomas Chapman* took the fee, the same result would follow; for, as soon as the fee was vested, all the limitations over in favour of the other branches of the family would be defeated. Upon the best consideration I am able to give to this will, I am of opinion, that *Thomas Chapman* took an estate tail; and I own, that though I entertain the greatest deference for the opinion of those of my learned brothers who took part in the decision of the case of *Doe d. Chapman v. Covell*, I cannot help thinking that they would have come to a different conclusion, if the whole of the will had been laid before them, and the point had been presented to their minds in the way in which it is now presented (a).

BAYLEY, J.—I agree in the opinion delivered by my Lord Chief Justice, and I have no difficulty in saying, after a careful review of this particular case, that I was wrong on the former occasion, when this will was under the consideration of the Court. I was very desirous of hearing Mr. *Polson* on the subject, for although the in-

(a) In stating that case for the opinion of the Court, the part of the will marked with asterisks in p. 79, ante, had been omitted.

clination of my opinion was rather against Mr. *Abraham*, during his argument, yet, after the discussion which the case has now undergone, I have no hesitation in saying, that, upon better consideration, my former opinion is changed. I take the general rule upon this subject to be, that wherever you find the words, "heirs of the body," in a deed or will, if upon the whole context of the instrument it appears that the donor or deviser intended thereby to designate particular persons answering the description of heirs at his death, they are to be construed as words of purchase; but if it appears that he meant by the words, "heirs of the body," to include a whole class, and to comprehend within it every person who may be heir of the body, then they are words of limitation, and the heirs take by descent. If particular persons are designated, they are words of purchase; if there be no designation of particular persons, they are words of limitation. This, I think, will be found to be the general rule, deducible from all the cases from *Jones v. Morgan* (a), down to the present time. Mr. *Hargrave*, in his observations concerning the rule in *Shelley's* case (b), says, the true test is, "whether, by a remainder to the heirs, either general or special, of a preceding tenant for life, it is the meaning of the instrument to include *the whole of his inheritable blood, the whole line of his heirs*; or to design only certain individual persons answering to the description of heirs at his death. If the former is the sense, the rule (in *Shelley's* case) always applies; and by vesting the remainder in the tenant for life forces it to operate by limitation, even though the instrument should contradictorily and inconsistently add in express terms, that the remainder shall operate as a contingent one, and enure so as to make the heirs purchasers." The former decision of the Court upon this will, in *Doe d. Chapman v. Covell*, was prior to *Doe v. Jesson*, which came before the House of Lords, and which

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(a) 1 Bro. C. C. 206.

(b) Hargrave's Law Tracts, 576.


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has certainly brought our attention more particularly of the legal decisions upon this question. I agree with Lord *Redesdale* in thinking, that the words "heirs of the body" must be taken in their legal sense, as comprehending the whole line of heirs, unless we saw plainly and distinctly an intention on the part of the testator to the contrary. Looking at the language of this will, I am by no means satisfied that it was the intention of the testator, at the time he made his will, to keep in view particular persons, or that he in any respect meant to comprehend the daughters of *Thomas Chapman*, so as to entitle them to take jointly, or as tenants in common. The words are, "I give and devise the same to and amongst all and every *the heirs of the body of Thomas Chapman, as well female as male.*" Now the females would not be heirs of the body, if the testator meant by "females" *daughters*; but if these words are used as shewing an intention to limit the estate to *Thomas Chapman* and his heirs in tail general, then the description of persons to take would be perfectly satisfied, for by that construction, the grandchildren of *Thomas Chapman*, being daughters as well as sons, would take. This view of the case was aptly illustrated by my brother *Littledale*, in the course of the argument. Suppose *Thomas Chapman* had six sons, three of whom died in his life-time, each leaving a daughter or daughters, who, upon the death of *Thomas Chapman* would be the persons to take, and who would answer the description of "heirs of the body?" Why, the daughters of the deceased sons, and the surviving sons. They would be heirs of the body, "as well female as male." If three of the elder sons died in the life-time of their father, leaving each a daughter, it is clear that, upon the death of *Thomas Chapman*, the three daughters, and his surviving younger sons, would constitute the "heirs of his body, as well female as male." That is one construction to be put upon the words, which will satisfy their meaning, so as to exclude the intention attributed to them in the argument

for the plaintiff. But there is another way in which the words "heirs of the body, as well female as male," might be satisfied. If there should be daughters only, then they would be heirs of the body, but they would take all together as coparceners, the lands being in gavelkind; or if there were daughters and sons, then the daughters would not take till after the line of the sons was entirely extinct. It might have happened that *Thomas Chapman* had left one son and several daughters; the estate must, in that case, have gone to the son in the first instance, and if he had died without issue, it would then go to and amongst the daughters, but in that case the daughters would take in coparcenery, inasmuch as lands in gavelkind could not go by descent to females as tenants in common, or as joint tenants. There are, however, many authorities which shew that the words, "to take as tenants in common, and not as joint tenants," will not prevent "heirs of the body," from operating as words of limitation, unless there is a plain and distinct intention, that they should operate as words of purchase. It does not follow that because the heirs of the body cannot take in the particular mode prescribed by the testator, therefore the limitation to the heirs of the body shall not have its technical legal operation. The case of *Doe v. Jesson* shews, that in such case the words of modification must be rejected. The case of *Doe v. Laming* differs from this in two important points. In the first place, to the words of limitation "to the heirs of the body, as well females as males," were superadded the words "*and to their heirs and assigns for ever*;" therefore the devise could not have been satisfied by an estate tail in the ancestor. In forming a judgment as to the effect of a devise to the "heirs of the body," the Court always takes into consideration, whether there are any other words superadded, so as to alter the legal import of the previous limitation. Another circumstance, noticed by Lord *Mansfield*, in giving his judgment on that case, in order to shew that the devise there could not operate by

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way of limitation, was, that the will contained no remainder over. Now in the present case there are no words of limitation superadded, and there is nothing to shew what interest the persons who are to take as "heirs of the body" would have, if they were to take as purchasers. The only ground for inferring that they were to take an estate *in fee*, is from the use of the words "*real estate*," in the previous part of the will. But if they were to take an estate *in fee*, that would entirely defeat every other limitation in the will, because the words, "and for default of such issue," must mean, default upon an indefinite failure of issue, and then all the limitations over would be by way of executory devise, and bad, as being too remote. In the former case stated for the opinion of the Court, no doubt some of the limitations over were stated, and if they had been brought more immediately under our consideration, they ought to have controlled our judgment in the opinion delivered on that occasion; but one of the very strong limitations over which is now particularly pointed out to our attention, and for which the 500 years' term was created, was not at all brought under our consideration. Whether that would have had any influence upon our judgment, I cannot pretend to say, but for the reasons now given, I am perfectly free to confess that the former decision was not a right one; and that upon the true construction which ought to be put upon this will, this is a devise of an estate to *Thomas Chapman* in tail general, and consequently, the lessors of the plaintiff are not entitled to recover.

HOLROYD, J.—I also think we must construe the words "heirs of the body," as words of limitation, and consequently that *Thomas Chapman* took an estate tail. The case of *Doe v. Jesson*, decided by the House of Lords, and the principles which must be considered as established by that case, go directly to the present case, and compel us to decide that this was an estate tail. There is but one

circumstance which at all differs this case from that, and that is in the use of the word "estate," which is in the subject of the devise, and which in many cases has been construed as giving the fee, without words of inheritance, but I think it ought to have no effect upon our present opinion. It appeared to me on the former occasion, that from the use of the word "estate," together with the other words of the devise, shewing that the testator meant that the heirs should take as tenants in common, (which would be inconsistent with their taking by descent), they must take an estate by purchase, without which all his directions could not be carried into effect, and consequently that the word "estate" would be sufficient to give the children of *Thomas Chapman* an estate in fee: But I am now satisfied, that in consequence of the subsequent limitations over, the word "estate" would not be sufficient in this case to carry the fee to the children. If we were to hold that it did, the consequence would be, that whatever was the intention of the testator with regard to the mode in which the heirs of the body of *Thomas Chapman* should take, although his wishes in that respect could not be carried into effect, yet we should be deciding that they could only take an estate for life, and then the estate would go over to the heir at law, even though there should be issue of the bodies of the heirs of the body of *Thomas Chapman* in existence, which would be contrary to, and would utterly defeat the main intention of the testator. It is obvious that the testator did not mean the estate to go over to the other branches of the family until the whole of the issue of *Thomas Chapman* should be extinct. Admitting that by giving effect to this main intent, his other intent, namely, that the heirs of the body were to take as tenants in common, and not as joint tenants, would be defeated, yet by law that intent must be sacrificed to that which was the primary object of the devise. It appears to me therefore, that in order to effectuate

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the intention of the testator, we must hold that the words "heirs of the body" of *Thomas Chapman* gave him an estate tail, and that his children took by descent. This construction is expressly warranted by *Doe v. Jesson*, on the authority of which, I think, this can only be considered an estate tail in *Thomas Chapman*.

LITLEDALE, J.—Where an estate for life is given to a person, with a limitation to "the heirs of his body," or "his issue," or other expressions denoting descendants, there are a great number of cases which shew, that, within the rule in *Shelley's* case, the devise is of an estate tail to the first taker. That principle may now however be considered as finally settled in almost all cases, by *Doe v. Jesson*, which is similar to the present in every material circumstance. In this case the limitation is to the heirs of the body as well female as male, to take as tenants in common, and not as joint tenants. There the limitation was to *W.* for life, and after his decease, to the heirs of his body, in such shares and proportions as *W.* by deed should appoint; and for want of such appointment, to the heirs of the body of *W.*, share and share alike, as tenants in common. In that case the House of Lords decided, that the words "as tenants in common," might be left out of the question, as being inconsistent with the general intent, which is much stronger than this, because there the power of appointment shewed more unequivocally the particular intent of the testator; but there having been no appointment, it was held that the words "heirs of the body," must be construed as words of limitation, and not as words of purchase. In the present case it is urged, that because the devise is to the heirs of the body "as well female as male," they must be construed as words of purchase, and for that *Doe v. Laming* is cited. I have already intimated, in the course of the argument, that I think the word "female" may be satisfied, by holding that the females might

take by representation. In all the cases where a deviser uses the words "heirs of the body" of the first taker, he means that the estate shall go in that line, as long as there are heirs of the body of that individual; but in general the deviser goes on to use other words, which seem inconsistent with the general notion of an estate tail in the first taker; and in such cases the Court is to see whether the particular expressions so superadded, are or are not repugnant to the legal effect of the words "heirs of the body," and if they are not, then to give the latter words their full operation. Acting upon that general principle, I am of opinion that the words "heirs of the body," in this devise, are not controlled by the expressions which follow, and consequently that *Thomas Chapman* took an estate tail. It cannot be said, that the words "all my real estate," used in the previous part of the will, shew an intention on the part of the testator to give an estate in fee to the children. In general those words would give the fee, but here they cannot have such a construction, because the testator, in express terms, disposes of the whole of the fee, in the first instance, to *Thomas Chapman* for life; and after his decease to the heirs of his body, remainder for a term of 500 years, remainder to the two other nephews, and remainder over to testator's own right heirs for ever. It does not necessarily follow because the word "estate" is used, that the whole is to go to one class of individuals; it only proves that the testator meant to dispose of the whole of his real property, in the manner subsequently provided by his will. If we were to hold that *Thomas Chapman's* children took a fee, the whole effect of the limitation over would be defeated. The limitation over is, "and for default of *such* issue." That means, a general failure of issue, when the estate is to go to the other branches of the family. It is said, that *Thomas Chapman's* children took only an estate for life; but that is contrary to the intention of the testator, in using the words "heirs of the body," which shew that

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as long as there should be heirs of the body of *T. Chapman* in existence they should take by virtue of the will, and that cannot be done, without holding that *Thomas Chapman* took an estate tail.

Judgment for the defendant.

DOE d. MORECRAFT v. MEUX and others.

Covenants to repair generally, and to repair within three months after notice in writing, are independent covenants.

Where a landlord, finding the demised premises out of repair, gave the tenant three months' notice to repair pursuant to his covenant:—

Held, first, that he could not maintain ejectment for a forfeiture until the three months had elapsed; and second, that the notice was a waiver of the breach of the general covenant to repair.

**THIS** was an ejectment for certain premises situate in the parish of *St. Paul, Covent Garden*, in the county of *Middlesex*. At the trial before *Abbott, C. J.*, at the *Middlesex* adjourned sittings after *Trinity* term 1824, a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court on the following case:—

On the day of the demise, which was laid on the 27th *December* 1823, the lessor of the plaintiff was, and still is, landlord of the premises in question. By indenture of lease made 1st *June*, 1769, between *S. Rowley* and *J. Rowley* of the one part, and *J. Chase* and *J. Cor* of the other part, *S. Rowley* and *J. Rowley* demised the premises in question to *J. Chase* and *J. Cor*, for 73 years and a quarter, from *Lady-day* 1769, with the usual reddendum and covenant to pay rent, and containing covenants of the lessees for themselves and assigns, and a clause of re-entry as follows:—"And the said *J. Chase* and *J. Cor*, for themselves, their executors, &c., do and each of them doth covenant, that they, their executors, &c., shall and will, at their own proper costs and charges, from time to time and at all times hereafter, during the term hereby granted, when and as often as need shall be, well and sufficiently repair, support, and keep the said messuage, &c., in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, and so yield them up at the

end of the said demised term. And further, that it shall and may be lawful to and for the said *S. Rowley* and her assigns, during the continuance of her estate in the said demised premises, and after the determination thereof, to and for the said *J. Rowley*, his heirs and assigns, &c., at her, his, or their free wills and pleasures, at any convenient hour in the day-time, twice or oftener in every year of the said term, to enter upon the premises, and see the state and condition of the reparations of the same; and of all defects and want of reparations then and there found, to give or leave notice or warning in writing, at the said demised premises, unto or for the said *J. Chase* and *J. Cox*, their executors, &c., to repair and amend the same within three calendar months then next ensuing; the said *J. Chase* and *J. Cox*, for themselves, their heirs, executors, &c., do covenant to repair and amend all such defects, of which such notice or warning shall be so given." Proviso for re-entry if said *J. Chase* and *J. Cox*, their executors, &c., shall not perform, fulfil, and keep all and singular the covenants in the said lease, to be by them performed, fulfilled and kept. The said term and interest in the premises vested in the defendants, before the dilapidations and notice to repair hereinafter mentioned. The premises being in some respects out of repair, the lessor of the plaintiff, on the 7th August, 1823, caused a written notice to repair to be served on the defendants, requiring them to do certain necessary repairs therein mentioned, within three months then next following, in these words: "I do hereby require you to repair and amend the same within the space of three calendar months from the delivery of this notice, as witness my hand this 6th day of August, 1823. *W. Morecraft*." On the 24th October, 1823, the lessor of the plaintiff received half a year's rent to the 29th September, 1823, being previously to the expiration of the said three months' notice to repair. The premises were, and continued out of repair from the time of serving the said notice to repair, until the time of the trial of this action. The question for

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the opinion of the Court is, whether the lessor of the plaintiff was entitled to declare in ejectment until the time mentioned in the notice to repair had expired: If the Court shall be of opinion that the action was brought too soon, a nonsuit to be entered; otherwise the verdict to stand.

*-Chitty*, for the lessor of the plaintiff. The question in this case will turn entirely upon the effect of the notice to repair. It is clear that the covenants in the lease, to keep the premises in repair generally, and to repair within three months after notice, are independent covenants, *Wood v. Day* (a). Being independent covenants, then, it is submitted that the breach of either will work a forfeiture. In *Horsfall v. Testar* (b), the covenant was "to repair the premises at all times as often as need or occasion should require, and at farthest within three months after notice," and the Court held it to be one entire covenant, the former part being only qualified by the latter. So that this case is perfectly distinguishable from that. The case of *Roe d. Goatly v. Paine* (c) seems an express authority in favour of the plaintiff's right to maintain this action. In that case the covenants were precisely similar to those in the present case; first, a general covenant to keep the premises in repair, and second, a covenant to repair within three months after notice left on the premises. The premises being out of repair, the landlord gave notice to repair *forthwith*, and before three months had expired from giving the notice he brought an ejectment, and it being objected that the action was brought too soon, Lord *Ellenborough* said: "The indenture contains a general covenant to keep the premises in repair. By breach of this the lease was forfeited and the notice was no waiver of the forfeiture." It cannot be said in the present case, that the notice to repair within three months was a waiver of the previous forfeiture incurred.

(a) 1 J. B. Moore, 389. 7 Taunt. 646. S. C. (b) 1 J. B. Moore, 89. 7 Taunt. 385. S. C. (c) 2 Campb. 520.

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The lessor of the plaintiff had a prior right of eviction for a forfeiture, by the breach of the general covenant to keep in repair. Notice to repair within three months, therefore, was not a disaffirmance of that prior right. The three months' notice is merely given for more abundant caution, and stands upon the same footing with a second notice to quit, which is not a waiver of the first. The mere act of giving notice, unless something is done upon it, cannot deprive the plaintiff of his right of re-entry. It is not like the case of a tenant beginning to do repairs upon a notice given, and thereupon the landlord becomes reconciled; but here the premises remained in statu quo up to the very time of the trial. [*Bayley, J.* The covenant is, to keep the premises in needful and necessary repairs; now the case does not state that the repairs which the defendants were required to do, were needful and necessary]. The covenant requires that the premises shall be absolutely repaired. Even a broken window, unless repaired, would amount to a forfeiture within the terms of the covenant. [*Holroyd, J.* According to your argument, if the tenant, in consequence of the notice to repair, had fully repaired within the three months, still the lease would be forfeited]. The argument certainly amounts to that; and it is submitted that the forfeiture for the breach of the general covenant to keep in repair is not waived by the notice. [*Bayley, J.* The question is, whether the forfeiture is not necessarily waived thereby?—*Holroyd, J.* The action for damages may not be waived, but the question is whether the landlord can now go for a forfeiture? In the case of a breach of covenant for the non-payment of rent, covenant will lie, but the forfeiture would be gone, and yet there might be a breach of the covenant.—*Bayley, J.* Forfeitures are odious to the law, and they may be waived.] The case of *Roe v. Paine* seems precisely in point with this.—[*Littledale, J.* There the notice was to repair *forthwith*.—*Bayley, J.* Here the notice is to repair within three months, and for any thing that appears the tenant might

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have done all that was necessary within the three months. —*Littledale, J.* But “forthwith” means a reasonable time to the party to do what is required to be done in the common course of things. Here the tenant might have done all that was required within the three months, and he was not bound to do it until the last day].

*Brougham*, contra, was stopped by the Court.

BAYLEY, J. (a).—I agree that upon the authority of the case of *Wood v. Day*, these are distinct and independent covenants, one to put in repair when need shall be, and the other within three months upon notice, in writing, given for that purpose. In this case the landlord had his option to proceed upon either one or the other. He might have maintained an action of covenant for the breach of the first, in not keeping in repair; but it does not follow that he might bring an ejectment for a forfeiture. This is an ejectment for a forfeiture, and the law holds a lessor strictly in the case of a forfeiture; for if there has been any thing like a waiver, it is an answer to his ejectment. The question then is, whether there has not been a waiver in this case? On the 6th *August* the landlord finds the premises out of repair. What does he do? He does not insist upon an immediate forfeiture; he does not bring his ejectment then; on the contrary, he affirms that the tenancy subsists up to the 29th *September* following, by receiving on the 24th *October*, half a year's rent up to that day. On the 7th *August* he gives a notice to repair within *three months*. Is not that in effect saying, “If you do repair within three months I will not bring an ejectment for a forfeiture?” Before that time however has elapsed, and before it is ascertained whether the tenant will or will not repair, an ejectment is brought. The case of *Roe v. Paine* appears to me to be perfectly distinguishable from this, because there the language of the notice to repair is

(a) *Abbott, C. J.*, was absent.

very different. Here the landlord gives notice to repair within three months, and the tenant has the whole of that time to comply. There the landlord says, "Repair forthwith; that is, promptly, directly, and if you begin to repair directly, I waive the forfeiture." The language of the two different notices shews that the parties hold out a different rule for the conduct of the tenants. In the one the landlord says, "If you repair within three months I shall be satisfied;" but in the other he says, "You must repair forthwith." Upon the principle, therefore, that the notice to repair within three months was a waiver of the first breach, and that the plaintiff was bound to wait until the expiration of the three months, I think this ejectment was brought too soon.

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HOLROYD, J.—I am of the same opinion. I think that the notice to repair within three months amounted to an admission of a continuing tenancy until that time had expired, and that the plaintiff could not bring his ejectment until after the three months had elapsed. For this, and the other reasons intimated in the course of the argument, it appears to me that the ejectment was brought too soon.

LITLEDALE, J.—I think the three months' notice to repair was a waiver of the original breach of covenant, and that ejectment could not be maintained until the time mentioned in the notice had expired.

Postea to the defendants.

BRUNTON v. WHITE.

ROTCH moved to change the venue in this case from *London to Lancashire*, on the usual affidavit. The cause of action was the infringement of certain letters patent, granted to the plaintiff for an improvement in mechanism.

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 is the infringe-  
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PER CURIAM.—We know of no precedent for this application; and unless some instance is cited in which the Court has changed the venue where the cause of action was the infringement of a patent, we cannot grant the present motion.

*Rotch* said, he could not find any authority for the application, and therefore took nothing by his motion.

Rule refused (*a*).

(*a*) Vide *Tidd*. 653. 8th ed. 2 Archbold Pr. 175.

Monday,  
November 7th.

Where defendant removes proceedings from an inferior Court by certiorari, plaintiff is not bound to follow the suit. In such case, if defendant signs judgment of non-pros, for want of a declaration, he is irregular, and is not entitled to costs.

CLARK v. The MAYOR, BAILIFFS, and BURGESSES of  
BERWICK-UPON-TWEED, and SAUNDERSON.

THIS was a rule calling upon the plaintiff to shew cause why the Master should not review his taxation, and allow the defendants their costs upon a judgment of non-pros. The affidavits disclosed the following facts. Early in *January*, 1821, the defendants distrained the plaintiff's goods for rent. On the 19th of the same month, the plaintiff replevied, and entered into the usual bond, conditioned to appear and prosecute his suit with effect in the court of Pleas at *Berwick*. At a court held on the 23d of *January*, the plaintiff entered an action of replevin, and at a court held on the 6th *February*, he filed a plaint against the defendants, before the mayor and bailiffs, who were both judges of the court and members of the corporation, and, as such, defendants in the suit. Upon this ground the defendants removed the suit into this Court, by writ of certiorari, returnable in one month after *Easter*, and of which the plaintiff had notice. A rule to declare was afterwards served, which the plaintiff neglected to obey, upon which the defendants signed judgment of non-pros. The Master being of opinion that the judgment was ir-

regular, refused to allow the defendants their costs, and the present rule was obtained, against which

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*E. Alderson* shewed cause. The judgment was irregular, consequently the defendants are not entitled to costs. The well known distinction between a removal by writ of recordari facias loquelam, and by writ of certiorari, decides this case. In the former writ, a day is given to each party to appear in the court above, and upon that ground the defendant is entitled to costs upon a judgment of non-pros, *Davies v. James* (a); but where the suit is removed by certiorari or habeas corpus, no day is fixed, and the plaintiff is not bound to follow the suit; therefore a non-pros is irregular, and does not entitle the defendant to costs. *Clack v. Dixon* (b).

*Ingham*, contra. It must be admitted, upon the authority of *Davies v. James*, that, where the defendant, in an inferior court, removes the suit by habeas corpus, the plaintiff is not bound to follow him. But there is this material difference between a removal by habeas corpus and by certiorari, that in the former no day is fixed for the return, and in the latter there always is. In *Watson v. Eagle* (c), which was the case of a removal by certiorari, the court of Common Pleas set aside the judgment of non-pros, upon the ground that it was signed too soon; but the distinction now pointed out was admitted in argument, and the objection now relied on by the other side, was not taken. There is a further distinction between the two modes of removal; namely, that the certiorari removes the record itself (d), and the habeas corpus the copy only; consequently, the observations of *Buller, J.*, in *Davies v. James*, respecting a removal by habeas corpus, do not apply to this case, where the removal is by certiorari.

(a) 1 T. R. 372. See *Tidd*. 419. 6th ed.

(b) 3 M. & S. 93. See *Tidd*. 412. 8th ed. (c) 4 J. B. Moore, 190.

(d) *Palmer v. Forsythe*, ante, vol. vi., 497.



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ABBOTT, C. J.—The distinction pointed out by Mr. Justice Buller, in the case of *Davies v. James*, shews that the judgment of non-pros signed in this case is irregular, therefore it follows that the defendants are not entitled to their costs. I think that distinction is a perfectly sound one. The writ of recordari directs that the sheriff shall have the record before the justices at *Westminster*, on a day certain, “and prefix the same day to the parties, that they be then there to proceed in that plea, as it shall be just.” The writ of certiorari gives no such direction, but simply requires that the record and process shall be returned; and where no day is given to the party to appear, we have no authority to pronounce judgment against him for not appearing. This rule, therefore, must be discharged.

The other judges concurred.

Rule discharged (a).

(a) Vide *Tidd*. 413, 419. 8th ed. Fitz. Nat. Brev. 162, 458. Gilb. Repl. 106, 107.

Tuesday,  
 November 8th.

LATIMER v. BATSON, esq.

Where the bona fide assignee of a bill of sale executed by the sheriff under a *fi. fa.* against the goods of A., allowed the latter to remain in the possession and enjoyment of the goods until another

execution was put in, and the same effects were again seized:—Held, that the first execution, being notorious, the assignee of the bill of sale might maintain trespass against sheriff, and that an absolute change of possession was not necessary to give effect to the bill of sale as against creditors.

THIS was an action against the late sheriff of *Oxfordshire*, for a trespass in seizing, taking, and carrying away certain goods and effects, the property of the plaintiff. Plea, not guilty; and issue thereon. At the trial before Garrow, B., at the last assizes for the county of *Oxford*, the case was this:—In *Michaelmas* term, 1819, a Mr. Richardson had obtained a judgment against His Grace the Duke of *Marlborough*, for the sum of 3070*l.*; and on the 6th November, 1823, he sued out a *testatum fieri facias*

into *Oxfordshire*, to levy the amount upon the furniture and effects in the mansion of *Blenheim*, but it was not executed until the 28th *January*, 1824, when the sheriff, under an alias fi. fa, effected a seizure. An inventory was then taken of the furniture and effects, and a sheriff's officer being put into possession, nothing further was done until the 24th *September*, 1824, when the sheriff executed a bill of sale to Mr. *Richardson*, of part of the effects, to the amount of 700*l.* Shortly afterwards *Richardson* assigned this bill of sale to the plaintiff, for valuable consideration, payable by two bills of exchange, at distant dates. On the 24th *September*, 1824, the sheriff's officer was withdrawn from *Blenheim*; and thereupon *Richardson* put a farming servant of his own into possession, leaving the bill of sale with him, and also another bill of sale of the remainder of the effects, of the same date. On the 16th *March*, 1825, Mr. *Leek*, another judgment creditor of the Duke, to the amount of 14,100*l.*, took out an execution for the sum of 8,640*l.*, and a warrant being delivered to the sheriff's officer, a levy took place, and all the effects previously seized were removed to *Woodstock*, when the plaintiff claimed the goods mentioned in the declaration as his property, by virtue of the bill of sale assigned to him by *Richardson*. Up to the time of the last execution, the Duke continued to reside at *Blenheim*, and had the undisturbed use and enjoyment of all the effects claimed by the plaintiff under the bill of sale. It was not denied that *Richardson's* execution was notorious at *Woodstock* and in the immediate neighbourhood of *Blenheim*. Under these circumstances it was contended, on the part of the defendant, that assuming the assignment by *Richardson* to the plaintiff of the property in question to be bonâ fide, still it was void as against other creditors, inasmuch as there had not been a complete change of possession, and *Wordall v. Smith* (a) was cited. The learned judge left it to the jury to say

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(a) 1 Camp. 332.

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whether there had been a bonâ fide sale of the goods to the plaintiff; for if they were of opinion that the plaintiff had really and truly purchased and paid for them, then, notwithstanding the possession subsequently enjoyed by the Duke, in his lordship's judgment the sheriff was accountable; but if on the other hand they were of opinion that the sale to the plaintiff was merely colourable, and that the purchase-money was in reality paid by the Duke, then they ought to find for the defendant. The jury having found their verdict for the plaintiff,

*Jervis* now moved for a new trial on the ground of misdirection. Admitting that the sale to the plaintiff was bonâ fide, still the learned judge ought to have told the jury that a complete change of possession was essential to enable the plaintiff to recover. Here there was no change of possession. On the contrary, the Duke was allowed to enjoy the use of the property, as much as if nothing had happened, and he had such a visible ownership, that assuming him liable to the bankrupt laws, the property must have passed to the assignees under 21 Jac. I., c. 19, s. 11. In either view of the case, whether the sale was colourable, or the Duke was allowed to remain in possession still the sale would be void by operation of 13 Eliz., c. 5. [*Bayley*, J. If this was a bonâ fide purchase, and it was notorious in the neighbourhood that there was a change of ownership, might not the purchaser allow the original proprietor to retain the possession of the goods?] Here the question of notoriety was never put to the jury, and therefore that term in the proposition put by the Court is wanting. It certainly is not denied that *Richardson's* execution was known at *Woodstock*. The case of *Wordall v. Smith* is however an express authority to shew that this action is not maintainable. There Lord *Ellenborough* said, "to defeat the execution by a bill of sale, there must appear to have been a bonâ fide, substantial change of possession. It is a mere mockery to put in another

person to take possession jointly with the former owners of the goods. A concurrent possession with the assignor is colourable. There must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors." On the authority of this case, it is clear that the present case was not properly left to the jury. Here there was not an exclusive possession taken of the property on the part of the plaintiff, and therefore the sale, assuming it to have been bonâ fide, was absolutely void. [*Abbott, C. J.* The subsequent possession was immaterial, if the sale was originally bonâ fide and notorious.—*Bayley J.* The case of *Leonard v. Baker (a)* is an express authority in favour of the plaintiff's right to recover].

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ABBOTT, C. J.—I think this case was sufficiently left to the jury by the learned judge. The facts proved here vary materially from those in *Wordall v. Smith*. Undoubtedly the expressions there used by Lord *Ellenborough* are strong, and very much to the purpose; but if we understand those expressions, (as we ought to do), with reference to the facts of the case, it does not appear to me that they afford any authority, requiring the learned judge to have left to the jury any distinct question as to the possession of the goods. The facts of that case were these. All the effects of *Mason*, consisting of his household furniture, and his stock in trade as a publican, before the issuing of the fieri facias, had been assigned to one of his creditors. A bill of sale was accordingly given in evidence; and it was proved that a servant of the assignee was immediately put into the house: but it likewise appeared that *Mason* and his wife continued to carry on the business as usual for several weeks after; during which time, the servant employed to keep possession, when he sold beer, put the money into the till, to which they had access. Now there are two very important distinctions between the facts of that case

(a) 1 M. & S. 251.

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and this. First, in that case the assignment was made to a creditor, without any previous execution issuing, or any notice to the world that *Mason* was a failing man; and second, the goods assigned were the furniture and stock in trade of a public-house, and the business was afterwards carried on by *Mason* precisely as if no such assignment had been made. Here the assignment to *Richardson* was made under the authority of the sheriff, after he had entered and seized the goods under the process of the law, and it is found by the jury that part of the goods were afterwards sold by *Richardson* to the plaintiff, for valuable consideration, the latter allowing the Duke to continue the use of them as matter of accommodation merely. I agree with what Mr. *Jervis* has said at bar, that possession is very much to be regarded; but then it is to be regarded upon the question of the bonâ fides of the original transaction. Possession, I admit, is generally of great importance; but when once it is ascertained that the original transaction was bonâ fide, and that the party who claims the goods has actually bought and paid for them, or has made himself liable to pay for them with his own money, I think the question of possession becomes less material. Here the jury have affirmed the good faith of the transaction, and it being admitted by Mr. *Jervis* that the fact was known at *Woodstock*, and in the neighbourhood of *Blenheim*, that there had been an execution in the house of this nobleman, I think it was not necessary to leave any question to the jury relative to the possession. The question for their consideration was, properly, whether this was a bonâ fide transaction, and that fact being ascertained, the subsequent possession was unimportant, as it respected the plaintiff's right to recover.

BAYLEY, J.—In this case the goods, which are the subject of the action, had been originally seized under a fieri facias, at the suit of *Richardson*, and he afterwards obtained a bill of sale of them from the sheriff. I assume, from the

concession made by Mr. *Jervis*, that this transaction was perfectly well known in the neighbourhood, and consequently no other creditor could have a right to subject the goods to a subsequent execution. It being notorious then, that the Duke of *Marlborough* had no longer any ownership in the goods, though they remained in his possession, *Richardson* assigns the bill of sale to the plaintiff, for valuable consideration. The consequence of that state of facts is, that no other creditor had a right to seize them, and if he did so he was liable to an action. In addition to *Leonard v. Baker* (a), there have been two other cases, in which it has been decided, that if the goods of a particular person are taken in execution, and are bonâ fide sold to a third person, although that third person suffers the former owner to retain the possession; yet if he keeps possession under such circumstances, that it is notorious in the neighbourhood that he has no longer the ownership in the goods, they will be protected against any subsequent execution. This principle was expressly decided in *Watkins v. Birch* (b), and *Joseph v. Ingram* (c). Taking it therefore that the transaction in question was notorious in the neighbourhood, I think the proper question to be left to the jury was, whether the sale to the plaintiff was merely colourable, or whether he was really and in good faith the purchaser of the goods; and the jury having found that it was a bonâ fide sale, I see no reason for disturbing the verdict.

HOLROYD, J.—I am also of opinion that the proper question to be left to the jury was, whether the assignment to the plaintiff was bonâ fide. If they were satisfied that it was, that gave the plaintiff a right of action. Then as to the question of possession; although the possession was not changed, yet if the transaction was bonâ fide, that gives the plaintiff a right of property in the goods.

(a) 1 M. &amp; S. 251.

(b) 4 Taunt. 823.

(c) 1 J. B. Moore, 189. S. C. 8 Taunt. 838.

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The principle laid down by Lord *Eldon*, in *Kidd v. Rawlinson* (a), seems to me to be applicable to, and must govern this case.

LITTLEDALE, J., concurred.

Rule refused.

(a) 2 Bos. & Pul. 59:

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 November 8th.

DOE d. ELLAM v. WESTLEY.

Devise to
M. W. of "all that my messuage and tenement wherein I now dwell, with the garden and all the appurtenances thereto belonging; and I also give to the said *M. W.* all my household goods and chattels, and implements of household within doors and without, all for her own disposing, free will and pleasure, immediately after my decease:"—
 Held, that *M. W.* took only an estate for life in the real property.

THIS was an ejectment for certain premises situate in the parish of *West Wratting*, in the county of *Cambridge*. At the trial before *Alexander*, C. B., at the last assizes for the county of *Cambridge*, the case was this:—The lessor of the plaintiff claimed the property in question as heir at law of *Joseph Ellam*, who died seised thereof in fee. The defendant was heir at law of *Mary Westley*, devisee under the will of *Joseph Ellam*. After giving several pecuniary legacies, the bequest of each of which was premised by the word "Item," the testator devised as follows:—"Item, I also give and bequeath unto *Joseph Ellam*, the youngest son of my brother *John Ellam*, all that my messuage or tenement, now in the occupation of *John Noble* and *James Harrison*, with the orchard, garden, and all the appurtenances thereto belonging; and after his decease I give to his son *Joseph Ellam* the messuage or tenement and all thereto belonging. Item, I give and bequeath also unto *Mary Westley*, the youngest daughter of *Richard* and *Sarah Westley*, that now dwells with me, all that my messuage or tenement wherein I now dwell, with the garden and all appurtenances thereto belonging; and I also give to the said *Mary Westley* all my household goods and chattels, and implements of household within doors and without, all for her own disposing, free will and pleasure, immediately after my decease." The testator appointed

Joseph Ellam and *Mary Westley* the executor and executrix of his will. The question at the trial was, whether the words "all for her own disposal," &c., in the devise to *Mary Westley*, over-rode the whole of the bequest so as to give her the fee in the realty, thereby devised. The learned judge was of opinion that *Mary Westley* only took a life estate in the premises, and therefore a verdict was found for the plaintiff, with liberty however to the defendant to move to enter a nonsuit.

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Storks now moved accordingly. If the whole of the devise to *Mary Westley* be taken as one sentence, it is clear that she took an estate in fee; but even assuming that it forms two distinct sentences, still the Court will give effect to the manifest intention of the testator. That he intended to give her an estate in fee is a matter of necessary inference, when the devise is contrasted with the previous gift to his brother *John's* youngest son, of the other part of his freehold property. He there gives his brother *John's* youngest son an estate for life, and then over. But in the devise to *Mary Westley* the gift is absolute in the first instance, without any limitation whatever. Taking however the construction of this part of the devise to be doubtful, still the words "*all for her own disposal*," &c., are so connected with the whole of the sentence, that they must over-ride it. Assuming this to be so, then there are several authorities to shew that the words "all for her own disposal," &c., are sufficient to pass the fee; *Jenner* and *Hardie's* case (a), *Goodtitle v. Otway* (b), *Loveacres v. Blight* (c). These words are also to be construed as referring to the freehold and not merely to the personal property. For this, *Fenny v. Ewestace* (d), seems to be an authority. There the testator devised, *first*, to his wife all his household goods, &c.; *secondly*, to his two nephews *John* and *Thomas Collings*, all that piece of land called *Priestland*, &c.; *thirdly*, as follows:—"I give unto my

(a) 1 Leon. 283. (b) 2 Wils. 6. (c) Coup. 352. (d) 4 M. & S. 58.

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nephew *John Collyer* all that my house and premises at *Pitston*, in the occupation of *R. Read*; I ALSO give unto my nephew *John Collyer*, all that my land in the parishes of *Pidleston* and *Aubury*, in the occupation of *J. Tompkins*, to him my said nephew *John Collyer*, *his heirs and assigns for ever;*" and Lord *Ellenborough* was of opinion that the words of inheritance in the last branch of the devise enlarged the gift of the house and premises at *Pitston* into a devise of an estate in fee. So here the words "all for her disposal," must control the previous devise. If the testator meant *Mary Westley* to take only an estate for life, it is very probable he would have so said; but having provided sufficiently in his judgment for his relations, he gives her this message, and the personal property therein, "all for her own disposal."

ABBOTT, C. J.—I think the safest course is to construe the two distinct sentences in the will as two distinct and separate devises; and consequently it will follow from the legal effect of the first sentence, that *Mary Westley* took only an estate for life. In the case of *Fenny v. Ewestace*, such a construction could not possibly be put upon the devise, because the testator plainly shewed by the form of his will, and the enumeration of the different devises, that he intended under the third devise, to pass the fee to his nephew, *J. Collyer*, in the premises at *Pitston*, as well as in those at *Pidleston* and *Aubury*. In this case there is nothing whatever to connect the two sentences, so as to identify the words "all for her own disposing" with the real estate. Probably the testator meant to give this part of his property to *Mary Westley* in fee, but it is a settled rule of law, that if there is no gift in fee, the devise in question must be construed only as a life estate, and consequently the heir at law will take. This is the safest rule of construction in the present case.

BAYLEY, J.—In order to pass more than an estate for

life, it is necessary to ascertain whether the words of the devise import a plain intention on the part of the testator to that effect. That being the general rule by which wills are to be construed, does this devise shew a plain intention, that *Mary Westley* was to take more than a life estate? The testator has used no words of limitation, or any expressions shewing the quantum of interest which she was to take.. In the devise of the premises in the occupation of *Noble* and *Harrison*, he gives a life estate by implication to his nephew, with remainder over to *Joseph Ellam*. Then comes the clause in question:—"Item, I give and bequeath also unto *Mary Westley*, the youngest daughter of *R. and S. Westley*, that now dwells with me, all that my messuage or tenement wherein I now dwell, with the garden and all appurtenances thereto belonging." Stopping here, there is nothing descriptive of the quantum of interest which she is to take, nor are there any words of limitation. He then goes on:—"And also, I give to the said *Mary Westley* all my household goods and chattels, and implements of household within doors and without, all for her own disposing, free will, and pleasure, immediately after my decease." The first sentence is complete and perfect; and then he comes to another sentence, "And also." Now it is a very old observation, that the introduction of the word "Item," shews that the testator is going to something new, and that which follows is applicable to the new subject only, and is not to be extended to the preceding matter, unless it is clear from the expressions used, that it must have been the testator's intention to modify or extend the preceding devise. Here the words are "all for her own disposing, immediately after my decease." It may be that the word "all" was intended to apply to the estate in land, but it is incumbent on the party interested, to make out as a foundation that such was the intention. I think it is, at least, doubtful whether the words were intended to extend to the real estate as well as the personal, and therefore the heir at law is entitled to recover. With


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respect to *Fenny v. Ewestace*, that is a very different case from this, because there the testator devised by numerical arrangement different things to be given to different parties, and when he comes to the third devise he says:—"I give unto my nephew *J. Collyer*, all that my house and premises at *Pitston*, in the occupation of *R. Read*; I also give unto my nephew *J. Collyer*, all that my land in the parishes of *Piddleston* and *Aubury*, in the occupation of *J. Tompkins*, to him, my said nephew *J. Collyer*, *his heirs and assigns for ever*." What was the foundation of the opinion given by Mr. Justice *Le Blanc* in that case? He said: "I think the numerical divisions clearly shew, that by the phraseology which the testator has used both in the second and third clauses, he means to describe, first, the persons and the property which were the subject of his devise, and to wait until the end to point out the estate he devised." That is a perfect and clear ground to shew upon what principle that case was decided, and it is therefore distinguishable from the present case.

HOLROYD, J.—I also think, that the case cited of *Fenny v. Ewestace* does not apply to the present case. Here the devise of the real estate is in the beginning, and forms a distinct and independent clause, without any connection with the clause devising the personalty. This being a question between the heir at law and the devisee, unless there are some clear and unequivocal expressions to shew that the testator meant to disinherit the heir at law, the devisee will take nothing but a life estate. Now the words "all for her own disposing," &c., in the second clause, will have their operation by confining them solely to the personal property. It may be doubtful whether the testator did or did not mean to extend these words to the prior devise, but that will not be sufficient to justify us in holding that *Mary Westley* took more than a life estate.

LITTLEDALE, J.—I think the devise forms two distinct

sentences, the first giving a life estate in the freehold property, and the second an absolute bequest of the furniture.

Rule refused.

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EDWARDS v. HETHERINGTON.

Tuesday,  
November 8th.

**ASSUMPSIT** for the use and occupation of a house and premises situate in *Wilmot Street, Brunswick Square*. Plea, the general issue. At the trial before *Abbott, C. J.*, at the *Middlesex* sittings after last term, it appeared in evidence, that in *March*, 1823, the defendant entered upon the premises in question as tenant from year to year, to the plaintiff, who had a lease for 21 years. The defendant let some part of the house to lodgers, and occupied the remainder by himself and family. The party-wall having fallen into decay, it was agreed early in *June* between the plaintiff and the ground-landlord, that it should be repaired at their joint expense. After the repairs were determined upon, the ground-landlord inquired of the defendant when it would be convenient for him to let the workmen come in. The defendant replied, that it was not convenient then, but that they might come in about a week. On the 16th *June* the workmen began to repair the wall, but the inconvenience occasioned thereby was so great, that all the lodgers quitted the house before the quarter day; and in consequence of the workmen saying that the premises were in a dangerous state, the defendant was obliged to take a lodging for his own family in the neighbourhood. The defendant paid his rent up to *Midsummer* day, and continued in possession of the premises, carrying on his business as a lamp-manufacturer until the 5th *July* following, when he quitted the house without any notice to the plaintiff, and did not return the key

The lessee of a house under-let the same at *Lady-day* to A., as tenant from year to year, and before the end of the half year, put workmen into the house with A.'s consent, for the purpose of repairing a party wall, but the inconvenience occasioned thereby was so great that A.'s lodgers quitted the house, and he was obliged to take lodgings for his own family elsewhere, and after paying the rent up to *Midsummer* day, he remained in possession carrying on his trade till the 5th *July*, and then quitted, without notice to his landlord:—Held, that the latter could not maintain an

action for use and occupation for the second half year which had thus commenced, the jury finding that there had been no beneficial occupation.

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until the latter end of *July*. The plaintiff demanded half a year's rent from *Midsummer* to *Christmas*, and upon the defendant's refusing to pay, the present action was brought. It appeared that the plaintiff had paid the superior landlord for that half-year. At the time the defendant quitted, the repairs were almost completed. Under these circumstances, the learned judge left it to the jury to say, whether there had been any beneficial occupation of the premises on the part of the defendant, charging them that if there had not, the plaintiff had no right to recover. The jury found their verdict for the defendant.

*Abraham* now moved for a new trial on the ground of mis-direction. At all events the plaintiff was entitled to recover for the quarter's rent due from *Midsummer* to *Michaelmas*, and the learned judge ought to have directed the jury accordingly, inasmuch as the defendant had omitted to take advantage of his election to determine the tenancy at *Midsummer*, if he found the premises uninhabitable. Here the defendant voluntarily remained in possession of the premises until the 5th *July*, and as he did not deliver up the key till the latter end of that month, he made himself liable for one quarter's rent at the least.

ABBOTT, C. J.—Can it be said that this defendant had any beneficial occupation of the premises? The lodgers all go away before *Midsummer* on account of the dangerous state of the premises; the man is obliged to take a lodging elsewhere for his own family; he still keeps possession of the shop for a few weeks, in the vain expectation that he shall be able to carry on his business, and then finding it impossible to do so, he goes away altogether. Under such circumstances I think it would be exceedingly unjust to hold him liable for use and occupation.

The other judges concurred.

Rule refused.


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RYDER v. LORD C. TOWNSEND.

Wednesday,  
November 9th.

**ASSUMPSIT** for use and occupation. Plea, first; non assumpsit, except as to the sum of 29*l.* 1*s.* 4*d.*; and second, a tender of that sum. Issue thereon. At the trial before *Abbott*, C. J., at the last assizes for the county of *Norfolk*, the case turned upon the plea of tender, to support which, the defendant's farming bailiff stated, that "On the morning of the day in question (Saturday), I went to the plaintiff's house for the purpose of paying him 29*l.* 1*s.* 4*d.*; I saw him, and told him I was come to settle the rent, and I asked him his demand. He said 29*l.* 1*s.* 4*d.* I took out my pocket book, and said 'Have you a receipt?' He said 'No,' and asked what was the proper stamp. I told him the stamp would be a shilling, and I offered of my own accord to go and get a stamp. I then went away about my business. I returned again about two o'clock, but he was not at home. The plaintiff could not obtain a receipt stamp nearer than about five miles off. I waited about a quarter of an hour, but he did not come home. I went again near five o'clock, but he was not at home. I had the money with me. I went again between eight and nine o'clock, but he was not come home. On the *Monday* following I paid the money into the *Fakenham* bank in his name. When I saw him in the morning I had with me a 20*l.* bank of *England* note, and other notes to the amount of 9*l.*, and a shilling and fourpence in silver and copper money. I took the notes out of my pocket-book, and had the money in my hands. He saw me take the money out of the pocket-book. He had an opportunity of seeing the money if he chose to see it." Under these circumstances the learned judge thought the plea of tender was not made out, inasmuch as the offer to pay the money was accompanied with the condition of giving a receipt, and that the money was not in fact tendered or offered. The plaintiff therefore had a verdict.

Going with money in hand to make a tender, and demanding "whether the creditor has a receipt stamp," and receiving an answer in the negative, without an actual offer of the money, will not support a plea of tender.

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*Storks* now moved for a new trial, and contended that the production of the money by the witness to the view of the plaintiff was sufficient to support the plea of tender. The demand whether the plaintiff had a receipt, was not such a condition annexed to the offer to pay the money as would defeat the legal effect of the tender. It must be considered as an absolute tender, and inasmuch as the plaintiff was bound to be provided with a receipt, his want of a proper acquittance for the money was not to deprive the defendant of the benefit of the tender. [*Bayley, J.* The inquiry whether the plaintiff had a receipt stamp, was a strong intimation that the defendant's bailiff did not mean to pay the money unless he gave a receipt]. But ought not the plaintiff to be prepared to give a receipt? It lay upon him to give a proper discharge, and if the defendant's bailiff was ready with the money in his hand to pay it, the plaintiff's default ought not to prejudice the defendant. [*Abbott, C. J.* Was not the defendant's bailiff bound to take a receipt stamp and require the plaintiff to sign it]. That condition was not annexed. [*Bayley, J.* If I go to tender money to a man who has a demand upon me, and I say, "Have you got a receipt?" that is an intimation that I expect a receipt, and that I will not pay the money without it. If that be so, then this at the utmost can only be considered as a tender with a condition]. The question is, whether a person proposing to pay money to another is bound to take a receipt stamp with him.

ABBOTT, C. J. —The difficulty here is, whether there was any offer of the money at all. Now looking to the facts proved, we all think that there was no offer of the money to support the defendant's plea.

Rule refused (*a*).

(*a*) Vide *Douglas v. Patrick*, 3 T. R. 683. 4 Esp. N. P. C. 68. *Rivers v. Griffiths*, ante, vol. i. 215. *Brady v. Jones*, ante, vol. ii. 305. And *Cadman v. Lubbock*, ante, vol. v. 289, and the cases there cited.

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Friday,  
Nov. 11th.

## SELLERS v. KILLEW.

**CASE** for words injurious to the plaintiff's character. The declaration stated, that at the time of speaking the words complained of, plaintiff was, and still is, the *treasurer and collector* of certain tolls and rates, of and for certain persons, (not naming them), to wit, of certain tolls and rates arising out and in respect of certain lands and premises, and that in a certain discourse of and concerning plaintiff, as such *treasurer and collector*, defendant said, he (plaintiff) was a swindler and a robber, and had gathered tolls and put them into his own pocket. Plea, the general issue. At the trial before *Burrough, J.*, at the last assizes for the county of *Stafford*, it appeared in evidence that, by a private act of parliament, a certain field in the neighbourhood of the borough of *Stafford*, was vested in trustees for the benefit of certain householders, for the depasturing of cattle thereon, subject to such rules and regulations as should be made at a public meeting of the householders, of which public notice was to be given in the church, &c. The act directed that there should be a treasurer, who should collect certain payments, to be made for turning cattle on the field, with power to the householders to make rules and regulations for the management of the field in the manner therein mentioned. It appeared that annual horse races were held on the field, and that at a meeting of the householders it was agreed, that certain persons should enter thereon, for the purpose of erecting booths and stalls for the sale of refreshment, paying certain rates, which were to be collected and applied towards the necessary expense of fencing and manuring the field. Proof was given that the plaintiff had been appointed *treasurer*, conformably to the regulations of the act, and evidence was also adduced to shew, that he had been also appointed collector, to collect the rates at the annual races,

In an action for words, of and concerning the plaintiff, as "treasurer and collector" of certain tolls and rates, it appearing that the words were spoken of him in his character of *collector* only:—Held, that without due proof of his appointment as collector, pursuant to a private act of parliament, the action was not maintainable, even though he had acted as such collector at the time the words were spoken.



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and had acted under such appointment, but it appeared that the meeting of householders, at which he was appointed *collector*, had not been convened by public notice, as required by the statute. Under these circumstances, the learned judge was of opinion, that as the words proved must be construed as applying to the plaintiff in his character of *collector* only, and as strict proof was requisite, (which had failed), of his appointment as *collector*, conformably to the statute, the action was not maintainable, and therefore directed a nonsuit.

*Campbell* now moved for a rule nisi to set aside the nonsuit, and obtain a new trial. The allegation, that the words were spoken of and concerning the plaintiff as such *treasurer and collector*, is divisible proof, therefore, that they were referable to him in either capacity, is sufficient to support the action (*a*). It was distinctly proved that the plaintiff was duly appointed treasurer, and it appeared that he had *acted* at least as collector. Assuming, then, that the words must be confined in their operation to the plaintiff, in his character of *collector* only, still his having acted as collector is enough to support the declaration. At all events, it was a question for the jury, whether the words did not apply to the plaintiff in both or either of his capacities. It was not necessary for the plaintiff to shew that the words applied to him in both capacities; it was sufficient to shew that they were referable to his character of treasurer.

ABBOTT, C. J.—It appears to me that the nonsuit was right. The whole frame of the declaration shews that the words are applicable to the plaintiff in his character of collector only; and the words must be tied down to that part of the inducement. There is a manifest distinction

(*a*) *Figgins v. Coggs*, 3 M. & S. 369. *Hall v. Smith*, 1 Id. 387. *Teesdale v. Clement*, 1 Chit. R. 605. *Berryman v. Wise*, 4 T. R. 366. *May v. Brown*, ante vol. iv. 670. *Lewis v. Walter*, Id. 810.

between the office of a treasurer and of a collector. A treasurer is not a person who goes about to collect money, but the person into whose hands the money is paid when collected. If the words "and collector" were rejected from this declaration, there is nothing in the words which could, by any inuendo, be made applicable to the plaintiff as treasurer, and as his appointment of collector was not proved, I think the plaintiff's action failed.

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BAYLEY, J.—I am of the same opinion. I think this case does not come within the rule laid down in *May v. Brown(a)*, and *Lewis v. Walter(b)*. Here the words are alleged to have been spoken of the plaintiff in two characters; but they are manifestly applicable to him in his character of collector only, and as it appears that he was not duly appointed collector, the inuendo fails as to that, and there is nothing to make out the other part of the inuendo that they applied to him as treasurer. The special ground of imputation is, that the words were spoken of the plaintiff "as such treasurer and collector," and there is nothing in the case to bring it within the principle of the decisions, where there is a divisible allegation.

The other judges concurred.

Rule refused.


(a) Ante vol. iv. 670.

(b) Id. 810.

#### SHELDON v. WHITTAKER.

Friday,  
 Nov. 11th.

THIS was an action on the case by a landlord, against the sheriffs of *Middlesex*, for seizing the goods of one *Edward Meyer*, under a writ of fieri facias, issued out of the *King's Bench*, without first satisfying a year's rent due to the landlord. In an action on the 8th Anne, c. 14, against the sheriff, for seizing goods without satisfying the landlord's rent, the declaration stated the writ, under which the sheriff seized, to have been sued out in K. B., and it appearing in evidence to have been sued out in C. P. :—Held, a fatal variance.

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the plaintiff. The action was brought on the statute 8 *Anne*, c. 14. The declaration alleged, that the defendants, being the sheriffs of *Middlesex*, by virtue of a writ directed to them, "sued out of the court of our said lord the king," seized the goods of *Meyer*, &c. At the trial before *Abbott*, C. J., at the *Middlesex* sittings after last term, when the writ was produced, it appeared to have been sued out of the Court of *Common Pleas*, instead of the *King's Bench*, as alleged in the declaration. The learned judge thought this a fatal variance, and therefore directed a nonsuit.

*Gurney* moved to set aside the nonsuit, and obtain a new trial. It is submitted that the description of the Court, out of which the writ issued, may be rejected altogether as surplusage. The plaintiff does enough to support his action by shewing that the defendants wrongfully seized his goods, without first satisfying the rent in arrear. The statement of the writ is merely inducement, and need not be strictly proved. Therefore, whether the writ issued out of the *King's Bench* or *Common Pleas*, is immaterial. It is sufficient to shew that the sheriffs seized under some writ. [*Bayley*, J. Surely you must shew that it issued out of some Court; and if so, then you must state the Court correctly]. Certainly it must be argued that the description of the Court may be altogether rejected; and even that if it turned out that the writ issued out of the *Marshalsea*, the objection would not avail. [*Littledale*, J. If you only described it as "a writ," it might be a writ of attachment]. The modern decisions have very much relaxed the old rule on this subject, and shew, that whatever is mere matter of inducement, need not be strictly proved; *Purcell v. M'Namara* (a), *Draper v. Garratt* (b), *Jervis v. Sidney* (c), *Stoddart v. Palmer* (d).

(a) 9 East, 157.

(b) Ante, vol. iii. 226.

(c) Id. 834.

(d) Ante, vol. iv. 624. See *Phillips v. Shaw*, 4 B. & A. 435.

ABBOTT, C. J.—I think this is a fatal variance. This is an action upon the statute 8 *Anne*, c. 14, against the sheriff, for removing goods without satisfying the rent due to the landlord, and therefore it is necessary to shew, that the writ issued out of some Court, and that the sheriff seized in pursuance thereof. As the seizure under the writ is the gist of the action, the plaintiff is bound to prove the description which he has given to the writ. This has not been done in the present case, and therefore there was a fatal variance.

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BAYLEY, J.—It is clear that the plaintiff must state that the writ issued out of some Court; and therefore if he alleges that it was sued out of the *King's Bench*, and it turns out to have been sued out of the *Common Pleas*, the variance is fatal.

HOLROYD, J., and LITTLEDALE, J., concurred.

Rule refused.

SOMERS v. KING.

Friday,  
November 11.

F. POLLOCK moved for a rule calling upon the plaintiff to shew cause why the defendant should not be at liberty to sign judgment of *non pros*, on an affidavit stating that by a judge's order the plaintiff was required to deliver to the defendant, within a given time, a bill of particulars of his demand, but had refused to comply therewith.

Where a plaintiff refused to deliver a particular of his demand, in obedience to a judge's order, the Court refused to allow the defendant to sign judgment of non pros.

BAYLEY, J. (a):—The introduction of the practice of requiring bills of particulars is certainly of modern date, and I am sorry to say it is very much abused, because it

(a) Abbott, C. J., had left the Court.

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affords encouragement not merely to delay, but to great expense to both parties in a variety of instances. The application for a particular of demand, however, stays the plaintiff's proceedings in the mean time, and I think we can do no more than stay the plaintiff's proceedings until the particular be delivered.

HOLROYD, J., and LITLEDALE, J., concurred.

Rule refused..

Saturday,  
November 12.

WOOD and another v. JONES.

A merchant in *England* sends goods of a given value to a merchant at *Quebec* for sale on his account. Before the goods are sold or the proceeds ascertained, the latter ships three cargoes of timber to the former, to credit in account. Two of them arrive. Against the third, the consignor draws a bill for the amount, whilst it is in transitu. In the interval, the consignee dishonours the bill and becomes insolvent:—Held, that the consignor had a perfect right of stoppage in transitu, and was not bound to wait until the mutual accounts between him and the consignee were finally adjusted.

**T**ROVER for a cargo of timber. Plea, the general issue. At the trial before *Bayley, J.*, at the last assizes for *Newcastle*, the case was this:—The plaintiffs were merchants at *Quebec*, having an agent in this country, and the defendant was the owner of the ship in which the cargo of timber in question had been consigned. In the year 1823, one *Brightman*, a merchant of *Newcastle*, had consigned a cargo of goods valued at 1500*l.* to the plaintiffs at *Quebec*, to be sold for his account. In return for this consignment, but before the goods were sold, or the proceeds were ascertained, the plaintiffs shipped three cargoes of timber, in three different vessels, amounting in the whole to about the value of 1500*l.*, and transmitted bills of lading to *Brightman*. Two of the cargoes came to *England* and were delivered, but before the arrival of the third, *Brightman* became insolvent, having just before indorsed the bill of lading to *J. and A. Read*, of *Newcastle*. The plaintiffs' agent, without any particular authority from his principals, but anticipating that the original consignment by *Brightman*, when sold, would not be sufficient to cover

the value of the goods, and was not bound to wait until the mutual accounts between him and the consignee were finally adjusted.

the amount of the timber shipped by the plaintiffs, gave notice to the defendant, owner of the ship in which the third cargo was expected to arrive, and also to *J. and A. Read*, the indorsee of the bill of lading, that the cargo was not paid for, and that he claimed it for the plaintiffs. On the arrival of the vessel the defendant delivered the cargo to *J. and A. Read*, pursuant to the bill of lading, whereupon the plaintiffs' agent brought the present action in their names. It appeared that whilst the third cargo was on its way to this country, the plaintiffs had drawn upon *Brightman* to the amount of 500*l.* against the value of the timber, and when the bill was presented it was dishonoured and protested for non-acceptance. Under these circumstances the question was, whether the plaintiffs by their agent, who had no specific authority for that purpose, had a right to stop the goods in transitu, before the accounts between the parties were finally settled and ascertained. The defendant's counsel went for a nonsuit, on the ground that the plaintiffs had no right to stop in transitu until they were in a condition upon the settlement of accounts, to make a specific demand as against the goods on arrival. The learned judge was of opinion, that as the plaintiffs had drawn against the amount of the goods in question by a bill which had been dishonoured, their agent had a right to stop in transitu when the timber arrived, and therefore he held that the action was maintainable. The plaintiffs had a verdict for 500*l.* the value of the cargo, minus 34*l.* for which they were disposed to give *Brightman* credit on the final settlement of the account. Leave was however given to move to enter a nonsuit, or to reduce the damages by the sum of 124*l.* for which it was insisted *Brightman* was entitled to have credit, upon a more accurate investigation of the accounts.

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*F. Pollock* now moved accordingly. The question is whether a foreign consignor, who has goods in his hands unsold belonging to the consignee, and upon the faith and

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credit of which he makes the consignment to this country, can by his agent, without any particular instructions for that purpose, stop the consignment in transitu upon a mere apprehension or speculation that the goods in the hands of the consignor may not ultimately be sufficient to cover the consignment. It is submitted, that under such circumstances no right of stoppage in transitu exists in law. In order to justify such a proceeding, the agent must be in a condition to shew that upon the balance of accounts, at the time the stoppage is made, his principals had a specific liquidated demand against the consignee. Here it is clear, that at the time of the arrival of the third cargo, the accounts between *Brightman* and the plaintiffs were wholly unsettled. For any thing that then appeared to the contrary the original consignment to *Quebec*, which remained unsold, might have more than covered the value of the timber transhipped by the plaintiffs. Until the mutual demands therefore were adjusted, no right of stoppage in transitu could exist.

ABBOTT, C. J.—I think we ought not to grant a rule nisi for a nonsuit in this case. It appears from the evidence, that the cargo stopped by the plaintiff's agent was not specifically shipped in return for the goods which *Brightman* had sent to *Quebec*, because the plaintiffs had drawn a bill of exchange for the price of the cargo whilst it was on its passage. Before the arrival of the cargo *Brightman* became insolvent, and did not accept the bill when presented. The question under these circumstances is, whether the plaintiffs by their agent had a right to stop in transitu, and I think they had. It is said that as there were other accounts depending between *Brightman* and the plaintiffs, until those accounts were liquidated or settled, or until the plaintiffs should be able to shew upon the settlement of those accounts that there would be money due to them, they had no right to stop in transitu. If the cargo in question had been intended as a return for

the goods originally consigned by *Brightman* to *Quebec*, there would have been a great deal of weight in that argument; but that was not the fact. The bill was specifically drawn to cover the third cargo of timber, and therefore under such circumstances the onus of shewing that on the final settlement of account there would be any thing due from *Brightman* to the *Quebec* house, did not lie upon the plaintiffs. They were not bound to shew what the result would be. The burthen of shewing that lay upon *Brightman*, and as the plaintiffs' agent exercised a sound discretion, under all the circumstances, I think the action is maintainable. Whether the damages ought to be reduced is another question; and with a view to that point the defendant may take a rule to shew cause.

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BAYLEY, J.—It is clear, from the evidence in the case, that the house at *Quebec* had not funds in possession belonging to *Brightman* sufficient to pay themselves for the timber in question. There is no doubt, therefore, that if when the cargo arrived *Brightman* had not the means of making payment, they had a right to stop it in transitu. The facts were these:—Whilst the timber was on its way to this country, the plaintiffs drew a bill upon *Brightman* for 500*l*. Before the vessel arrived, the bill was presented for acceptance and dishonored. It seems to me therefore, that the plaintiffs were entitled at that time to insist on stopping the cargo in transitu. This circumstance is not to be forgotten, that *Brightman*, who knew what the state of the accounts really was, as soon as he received the bill of lading, assigned it over to *J. and A. Read*, and soon afterwards became insolvent. Under these circumstances I am of opinion, that inasmuch as the plaintiffs had pledged their own funds without having any funds of *Brightman* in their hands at the time of the shipment, they had a right, upon the dishonor of the bill, to stop the timber in transitu, finding that *Brightman* was in a state of insolvency. The plaintiffs, at the time of the trial gave credit



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for 34*l.*, so as to reduce the amount of the damages, but if upon the investigation of the accounts it turns out, that they ought to make a deduction of 124*l.*; a rule nisi may be taken for that purpose.

HOLROYD, J.—I think that the defendants were not, under the circumstances of this case, upon the doubt or uncertainty whether the consignment transmitted by *Brightman* would cover the value of the timber, bound to wait until the fact was ascertained, before they exercised the right of stopping in transitu.

LITTLEDALE, J., concurred.

Rule refused.

Saturday,  
Nov. 12th.

WALPOLE v. SAUNDERS.

The stakeholder upon a cricket match between eleven players on each side at 5*s.* a-head, is liable to the winner, if the judge at Nisi Prius, in the exercise of his discretion, thinks proper to try the cause.

THIS was an action against a stakeholder to recover the sum of 55*s.*, the amount of a wager upon a cricket match, between eleven persons on each side, at 5*s.* a head. The cause was tried before *Onslow*, Serjeant, at the last assizes for the county of *Hertford*, and a verdict was found for the plaintiff. Damages, 55*s.*

*Andrews* now moved for a rule nisi to stay the judgment, on the ground that a wager on a cricket match being illegal, the learned judge ought not to have tried the cause; and he cited *Egerton v. Furzeman (a)*.

ABBOTT, C. J.—This objection should have been taken at the trial; but if the learned judge in the exercise of his discretion, thought proper to try the cause, though frivolous, I see no reason for disturbing the verdict, if it be a good verdict. I am by no means clear that the learned judge

(a) 1 R. & M. 213. 1 Car. & Pay. 613, S. C.

was bound to stop the cause on account of its frivolity. This is not a case within the 9 *Anne*, c. 14., and I see no objection to the verdict.

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BAYLEY, J., and HOLROYD, J., concurred (a).

Rule refused (b).

(a) *Littledale*, J., was absent.

(b) Vide *Eltham v. Kingsman*, 1 B. & A. 683. *Linal v. Longbotham*, 2 Wils. 36. *Clayton v. Jennings*, 2 Sir W. B. 706. *Brown v. Berkeley*, Cowp. 281. *Whaley v. Pajot*, 2 B. & P. 51. *Ximenes v. Jaques*, 6 T. R. 499. *Henkin v. Guerris*, 12 East, 247. *Johnson v. Bann*, 4 T. R. 1. *Brown v. Leeson*, 2 H. B. 43. *Smith v. Bickmore*, 4 Taunt. 474. *Cotton v. Thurland*, 5 T. R. 405. *Howson v. Hancock*, 8 T. R. 575. *Aubert v. Walsh*, 3 Taunt. 277. *Bate v. Cartwright*, 7 Price, 540, and *Robinson v. Mearns*, ante, vol. vi. 26.

Cox v. Todd and others.

Monday,  
Nov. 14th.


**ASSUMPSIT** for not accepting a quantity of barley pursuant to contract. Plea, the general issue. At the trial before *Bayley*, J., at the last assizes for the county of *York*, it appeared that the plaintiff and defendants being respectively merchants at *Hull*, the latter having warehouses at *Grimsby*, entered into the following contract for the sale and delivery of 3000 quarters of barley:—

“7th *March*, 1825, Sold Messrs. *J. Todd and Co.*, on account of Mr. *Edward Thomas Cox*, 3000 quarters of barley, equal to sample delivered, price 20s. per quarter; *delivered alongside a sloop or warehouse*, at *Grimsby* or *Hull*, at the buyer’s option, *in all April or sooner.*”

On the 28th *March*, 619 quarters were delivered pursuant to the contract, and in the early part of *April* another portion was delivered. The remainder came into the *Humber* on the 28th *April*, and immediately on the vessel’s arrival a message was dispatched to the house at *Hull*, informing the defendants of the arrival, and desiring

Where a quantity of barley was sold upon a contract to “deliver along side a sloop or warehouse at G. or H., at the buyer’s option, *in all April or sooner,*” and the barley was brought into dock at G. on the 29th *April*:—Held, that the contract was broken, inasmuch as it would then have taken four days to unload the vessel and deliver the cargo into the buyer’s possession.

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to know whether the barley should be delivered at the warehouse in *Hull*, or at *Grimsby*, or alongside any sloop. To this message, the answer sent was, "You had better see Mr. *Todd*, of *Grimsby*." The vessel then put into *Grimsby*, and was actually in dock on the 29th *April*, within two or three hundred yards of the defendants' warehouses. In the meantime the price of barley had fallen. The vessel with the utmost exertions of the crew could not have been unloaded in less than four days from the 29th *April*. The defendants refused to accept the remainder of the barley, on the ground that it had not been *delivered* within the time stipulated; and the case turned upon the legal construction of the words "*delivered* alongside a sloop or warehouse at *Grimsby*, or *Hull*, at the buyer's option, *in all April* or sooner." On the part of the plaintiff, it was contended, that the contract was sufficiently performed if the vessel was brought either alongside a sloop or a warehouse of the defendants' within the month of *April*, and that the actual delivery might be made within a reasonable time afterwards. The learned judge was, however, of opinion, that it lay upon the plaintiff to shew that the cargo could have been delivered within the month of *April*, and as it appeared that the vessel could not have been unladen in less than four days after arrival, he directed a nonsuit.

*Tindal* now moved to set aside the nonsuit, on the ground of misdirection; and submitted, that the vessel being actually in dock on the 29th *April*, that was a sufficient compliance with the contract, and imposed upon the defendants the liability to accept the barley.

ABBOTT, C. J.—The words in the contract are, "delivered, &c., in all *April* or sooner." If the word "delivered" means no more than "brought," then the plaintiff has performed the contract; but I think that is not its meaning. Suppose the vessel to have been sunk

at *Grimsby*, or *Hull*, on the 29th *April*, could it have been said that the barley was delivered within the terms of the contract? If not, then I think my brother *Bayley* properly directed a nonsuit.

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BAYLEY, J.—I thought at the trial, and am still of the same opinion, that upon the true construction of this contract, the defendants were entitled to have the whole of the barley in their actual possession within the month of *April* at farthest. When the vessel arrived on the 29th *April*, there was not time to get the cargo out within the period stipulated. One of the witnesses said, “working as much as possible, we could not have unloaded the vessel in less than four days.”

HOLROYD, J., and LITLEDAL, J., concurred.

Rule refused.

W. HALL v. L. A. HOLLANDER.

Monday,  
November 14.

THIS was an action of trespass, for driving a chaise with force and violence upon and against *J. F. Hall*, then and still being the son *and servant* of plaintiff, by means whereof said *J. F. Hall*, so then being the son *and servant* of plaintiff, was greatly injured, and became sick for the space of six months, during all which time plaintiff lost and was deprived of the *service* of his said son and *servant*, and of all the benefit and advantage which might and would otherwise have arisen and accrued to him from such *service*, to wit, at, &c.; and plaintiff was also thereby forced and obliged to pay, lay out, and expend a large sum only two years and a half old, “*per quod servitium amisit* :”—Held, that as the child was *incapable* of performing acts of service, the action was not maintainable. *Semble*, that the father might maintain a special action for expenses *necessarily* incurred by him, in having the child cured of the injury.

The relation of parent and child, though the latter lives with, and is under the control of its father, does not necessarily constitute the relation of master and servant. Therefore, where a father brought trespass for an injury to a child

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of money in and about endeavouring to procure his said son and servant to be cured, and in and about the procuring the necessary care and attendance for his said son and servant during his said illness, and was also greatly interrupted in carrying on and transacting his own lawful affairs and business, by being forced and obliged, in consequence of his poverty and inability to procure surgical aid, attendance and assistance for his said son and *servant*, at his own residence, to carry and convey his said son and *servant* elsewhere, to a place where he could obtain the same, to wit, at, &c. Second and third counts more general, but describing *J. F. Hall* as plaintiff's son and *servant*. Plea, the general issue. At the trial before *Abbott*, C. J., at the *Middlesex* sittings after last term, it appeared in evidence that the plaintiff's son, at the time of the alleged injury, was a child about two years and a half old. On the day laid, the defendant, whilst driving a one-horse chaise in the public streets, accidentally ran over the plaintiff's child, and thereby fractured his skull. The child was taken to *Middlesex* hospital, and after remaining there for about a fortnight was brought home by his father, under the idea that he would be better nursed there than at the hospital. For several months afterwards the plaintiff took him daily to the hospital for surgical advice, and at the end of that time he was discharged as cured. During the child's illness the plaintiff hired a servant to nurse him at weekly wages, exclusive of her board and lodging. The plaintiff was at no expense for surgical advice, and had he left the child wholly at the hospital he would have been cured gratuitously. There was no evidence that the child was capable of performing any actual service for his father. Under these circumstances, it was objected that the action was not maintainable, inasmuch as loss of services was the gist of this species of action, and as a child of such tender age was incapable of performing acts of service, the ground of action failed. The Lord Chief Justice was of this opinion, and directed a nonsuit.

*E. Lawes* (with whom was *Gurney*) now moved for a rule nisi to set aside the nonsuit and obtain a new trial. The question is, whether in the case of parent and child it is necessary in an action in this form, to prove an actual loss of services in order to support the allegation “per quod servitium amisit.” This case is distinguishable from that of a hired menial servant, where undoubtedly it is necessary to prove an actual loss of service; but where the relation of parent and child subsists, and the child is residing with the parent as part of the family, under his control, and bound to perform his reasonable commands, the character of servant is legally implied, and the loss of actual service is not necessary to give the parent a right of action, *Fores v. Wilson* (a), *Jones v. Brown* (b). [*Bayley, J.* This case is distinguishable from those. Here the child is *incapable* of performing any acts of service]. The slightest acts of service are sufficient to satisfy the allegation per quod, &c., and a child even of the tender age here proved, was capable of performing many acts, which though trifling, would be enough to support the averment. [*Bayley, J.* Did you desire the learned judge to leave it to the jury as a question of fact whether the child was *capable* of actual service?] Certainly not. The nonsuit took place on the supposition that the child was incapable of performing actual service, and the plaintiff yielded immediately to the learned judge’s opinion. But if the allegation “per quod servitium amisit,” is merely technical, it must be assumed, from the bare relation of parent and child, that an injury to the child whereby it is utterly incapacitated from performing any service, gives the parent a right of action. In cases of this nature the damages are given for any thing but the loss of the real services which the child is capable of performing. Juries look to the loss of comfort and the injury to the parents’ feelings from being deprived of the society of his child. This is the principle on which juries act in cases of seduction; and

(a) Peake’s N. P. C. 55.

(b) Id. 233. 1 Esp. 217. S. C.

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they do not estimate in pounds, shillings, and pence, the actual value of the daughter's services. But at all events here the plaintiff has sustained special damage by reason of the injury to his child, and for that he is clearly entitled to recover. He was obliged to hire a servant to attend him during his illness, and to incur great loss of time in carrying the child to and from the hospital, in consequence of not being able to pay for other medical assistance. [Bayley, J. If the father had *necessarily* incurred expense in procuring medical assistance for his child, that might have been a substantive foundation for maintaining an action; but here the father, instead of having the child well taken care of at the hospital, free of expense, wilfully incurs special damage, and therefore the ground of action in that respect fails]. It was not obligatory on the plaintiff to leave his child at a public hospital, and thereby deprive it of that comfort and tenderness which a parent owes to his offspring, particularly under circumstances of great bodily suffering.

BAYLEY, J.—I think the nonsuit in this case was perfectly right. Two grounds are suggested, on which it is contended that the action is maintainable; first, that the child being the servant of the plaintiff, he has lost the child's services; and secondly, that the plaintiff has necessarily incurred expenses, in and about the curing the child of the injury sustained. With respect to the first point, I apprehend it to be essential that the plaintiff should prove, not that the child had actually performed services, but that he was *capable* of performing actual service. I understand that the counsel for the plaintiff, in this case, did not desire at the trial, that the power of this child to perform acts of service should be put to the jury, but it was assumed from the tender age of the child, that he was perfectly incapable of performing any act of service. Then the authorities on this point seem to be all one way. In the cases to which Mr. Lawes refers, the child being of *capacity* to

perform acts of service, Lord *Kenyon* said it was unnecessary to prove that the child did perform acts of service, because it might be presumed, that living with the parent he would be required from time to time to do little offices for his father. In those cases the Court looked to the *power and capacity* of the child to perform service, and did not require proof of actual service. In the case of *Weedon v. Timbrell* (a), which was an action for criminal conversation with the plaintiff's wife, Lord *Kenyon* said, "This is like the case of an action by a father for the loss of service of his child; in which, however the parent may feel for the violation of his daughter's chastity, it is clear that no action can be maintained unless some evidence be given that the daughter performed some acts of service for the father;" and *Ashurst*, J., said, "The principle of this case is like that mentioned of debauching the plaintiff's daughter, in which the plaintiff must give some proof of acts of service done by her in order to support the allegation in the declaration; very slight evidence indeed is sufficient, but still it is necessary to give some." In the cases cited from *Peake's Nisi Prius Reports*, Lord *Kenyon* did not say that in cases in which it appeared that the child was incapable of performing service, the action was maintainable; all he said was, that in cases in which the child was living with the parent, and in a condition to perform actual service, he would not require evidence of any specific acts of service. In the case of *Satterthwaite v. Duerst* (b), which was decided in the interval between *Douglas* and the *Term Reports*, two points were decided; first, that an action would not lie for debauching the plaintiff's daughter unless the daughter was his servant at the time, for the loss of services is the gist of the action; and second, that it was no ground for maintaining the action, that the father had been at the expense incurred during the time of her lying-in. These cases shew that the gist of the action is the loss of services, and therefore,

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(a) 5 T. R. 357.

(b) 5 East, 47 n.



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though the relation of parent and child subsists, yet if the child is incapable of performing any services, the foundation of the action fails. Then, as to the second ground on which this action is attempted to be supported, I think that fails also. Did this plaintiff necessarily incur any expense in and about the curing of the child? According to the evidence, the child was carried to the hospital, where he might have been maintained and cured free of any expense to the plaintiff; but the plaintiff thought proper to remove the child to his own house, and voluntarily incur the expense which he now seeks to recover. I am certainly not prepared to say that a declaration might not be framed, in which the father being averred to be under an obligation to maintain the child, and having no means of providing medical assistance, he necessarily incurred expense in and about his cure, so as to enable him to recover. It is however unnecessary to decide that point in the present case. My opinion is founded on these grounds; first, that the child was incapable of performing any acts of service; and second, that the plaintiff did not necessarily incur any expense which would give him a right of action against the defendant.

HOLROYD, J.—I think the second point was not established by the evidence in the cause, inasmuch, as it did not appear that the plaintiff was necessarily put to any expense which he was bound to bear. Possibly, if that circumstance had been made out, it would have afforded a ground of action. It is however not requisite that we should give any opinion upon that point; indeed I have formed none. But I take it to be quite clear upon the other point, that for taking away a son or daughter, (except it be a son or daughter *and heir*, according to some old cases) (a) an action does not lie unless there is a loss of services, or what the law considers a loss of services. The mere relationship of parent and child, though the

(a) *Gray v. Jefferies*, Cro. Eliz., 55.

child lives with the father, is not sufficient in law to give the child the character of servant. In *Barham v. Dennis* (a), an action was brought for assaulting, taking away, and imprisoning the plaintiff's daughter, but it was held not to lie, and yet if she was to be considered as his *servant*; there would have been a loss of services occasioned by the tortious act of the defendant. Three of the judges held that the action was not maintainable, although *Glanville, J.* differed from the rest, and said: "for the father hath an interest in every one of his children, to educate them and to provide for them; and he hath his comfort by them. Wherefore it is not reasonable that any should take them from him, and to do him such an injury, but that he should have his remedy to punish it." In all the cases which have arisen for the seduction of a daughter, it has been considered essential to allege in the declaration that she was the servant of the plaintiff, and to give some evidence to shew that there was an actual loss of service, or that there was what the law would consider as constituting a loss of service. The same reasoning applies to the present case; and as the child here was *incapable* of performing any acts of service, I think the nonsuit was right.

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ABBOTT, C. J.—I take the principle of the common law with respect to this species of action to be, that a master may maintain an action for the loss of service sustained by the tortious act of another, whether the servant be a child or not; and therefore, wherever the relation of master and servant can be established in evidence, courts of law have allowed all the circumstances of the case to be taken into consideration with a view to the estimate of damages. We are now called upon to go a step farther, and to lay down as a proposition of law, that the action is maintainable, although the relation of master not only does not, but cannot exist, and that too in a case where the declaration alleges loss of services as the foundation of the

(a) Cro. Eliz. 770.

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action. If we were so to hold, we should be going farther than any former decision would justify, and therefore I think we ought not to grant a new trial (a).

Rule refused.

(a) *Littledale, J.*, absent.

Monday,  
 November 14.

BOND v. STOCKDALE.

Declaration by the payee against the maker of a promissory note to the order of the payee for "value received," generally, is not disproved by evidence of a note payable to the plaintiff's order for "value received in Mrs. L.'s estate."

**A**SSUMPSIT by the payee against the maker of a promissory note. The declaration stated, that on the 9th June, 1824, defendant made his certain note in writing, by which, six months after date, he promised to pay to the order of the plaintiff 17*l.* 2*s.* 5*d.* *value received*. Plea, non assumpsit. At the trial before *Abbott, C. J.*, at the *Midleser* sittings after last term, when the note on which the action was brought was produced in evidence, it appeared that after the words "value received," were added "*in Mrs. Lewis's estate*," whereupon it was objected that this was a variance; but the Lord Chief Justice over-ruled the objection, and the plaintiff had a verdict.

*Chitty* now moved for a rule nisi to enter a nonsuit, and renewed the objection, citing *Highmore v. Primrose* (a). Here is a mis-description of the instrument in the declaration. The words "value received" in terms import that the value has been received by the person who signs the note, but the instrument itself does not amount to such an acknowledgment, for there it is "value received *in Mrs. Lewis's estate*." It may be that the note was given to the plaintiff by the defendant as surety for *Mrs. Lewis*, in which case, the variance becomes material, for then the note would not have been described according to its legal operation.

(a) 5 M. & S. 65.

ABBOTT, C. J.—Why may not the defendant have received value in Mrs. *Lewis's* estate? I think there is no variance.

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BAYLEY, J.—The case of *Highmore v. Primrose* is perfectly distinguishable from this. There it was alleged in the declaration, that the bill was drawn by *J. S.* upon the defendant, requiring the defendant to pay the money “to the order of the said *J. S.*, 29*l.* 12*s.* value received by the said *J. S.*” When the bill was produced, it appeared to be for *value received* generally, and the Court held the variance to be fatal, because the bill as set out in the declaration imported that the “value received” was by the drawer himself, and not by the acceptor. In the present case, when the note says “value received in Mrs. *Lewis's* estate,” that only shews the mode in which the value was received by the defendant, but that does not vary his liability.

HOLROYD, J., concurred (a).

Rule refused.

(a) *Littledale, J.*, was absent.

DOE d. JANE BAINBRIDGE v. STATHAM and others.

Tuesday,  
November 15.

EJECTMENT to recover the possession of certain premises in the county of *Cumberland*. Plea, the general issue. At the trial before *Bayley, J.*, at the last *Carlisle* assizes, it appeared in evidence, that the lessor of the plaintiff was the widow of a person named *Bainbridge*, who became bankrupt in *October*, 1822, and died in *April*, 1824. By deeds of lease and release of the 18th and 19th *May*, 1815, the premises in question were conveyed to the

A conveyance to husband and wife and their heirs as joint tenants “in consideration of 200*l.* now in hand duly paid by husband and wife,” may be explained by extrinsic evidence, shewing that the money belonged to the wife only, so as to defeat the claim of the husband’s assignees under 21 *J.* 1, c. 15, s. 5.

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husband and wife and their heirs, as joint tenants. The consideration for the conveyance recited in the deeds, was "Two hundred pounds of lawful money of *Great Britain*, now in hand, duly paid by the said *James Bainbridge* and *Jane* his wife." Upon the bankruptcy of the husband, the defendants, as his assignees, took possession of the premises, and claimed them by virtue of the statute 21 *Jac.* I., c. 15, s. 5. Evidence was received to shew, that the consideration-money for the purchase of the estate was a legacy of 200*l.* left to Mrs. *Bainbridge* by her uncle, *Anthony Thorpe*, which was not payable to her until the month of *July*, 1815, two or three months after the date of the conveyance. It was proved by the plaintiff's attorney who negotiated the sale of the property, that the executors of Mr. *Thorpe's* will paid the deposit-money upon the purchase of the estate, and the remainder of the consideration-money on the execution of the conveyances. Under these circumstances it was contended, on the part of the defendants, that the legal operation of the deed was to pass the property to the husband, and from him to his assignees, inasmuch as on the face of the instrument the consideration for the purchase, was in law the property of the husband; and it was insisted that no extrinsic evidence was admissible to shew that the money belonged to the wife alone, inasmuch as the effect of it was to contradict the deed. The learned judge was of opinion, that the evidence was admissible to *explain* the deed, and so explained, it appeared to him that the property did not pass to the defendants. The plaintiff therefore had a verdict, with liberty however to the defendants to move to enter a nonsuit.

*Patteson* now moved accordingly. *Primâ facie* the deed in question, passes the property to the husband's creditors. In *Glaister v. Hewer*(a), it was held, that a purchase by a man in the joint names of himself and wife, if he was

(a) 8 Ves. Jun. 195.

a trader at the time, and afterwards became bankrupt, was void against the creditors within the statute 21 *Jac.* I., c. 15, s. 5. So, if the purchase was made with the wife's money, if previously received and disposable by him as his own. Here the consideration recited, is stated to have been paid by the husband and wife. Now in point of law, the money so paid is the husband's only, and all right to personal property in the wife acquired after marriage vests in her husband. The question then is, whether the evidence received at the trial was admissible for the purpose of shewing that the money belonged to the wife only. It is conceded, that evidence is admissible to shew that the consideration for a conveyance is different from that expressed in the deed; but here the evidence was not offered for that purpose; it was adduced in order to contradict the deed, and shew that the money belonged to the wife, or rather to the executors. It was therefore inadmissible. Whatever may be the rule in equity as to the wife's money, in law, all personal chattels belong to the husband. At law there is no such thing as a partnership in money, between husband and wife. If there had been a recital in this deed, shewing that the wife was about to purchase the estate with money bequeathed to her in her own right, that might have explained other parts of the instrument; but as it contains no such explanatory matter, the deed must have its legal effect, and cannot be contradicted by extrinsic evidence.

ABBOTT, C. J.—I am of opinion that the evidence at the trial was properly received, not for the purpose of contradicting, but of explaining the meaning of the expressions, “now in hand duly paid, by the husband and wife.” Those expressions would be equivalent to saying that the husband and wife had, in point of law, a joint property in the money paid. Therefore those very expressions raise in the mind a doubt as to whom the money really belonged, and certainly lead to no satisfactory conclusion.

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on the subject. As in the ordinary course of things the conveyance must have been to the husband and wife jointly, I think that the evidence was admissible as explanatory of that which was left in some degree of uncertainty. It appears to me that this was clearly the wife's money at the time the estate was purchased, and that the husband could by no means complain of the manner in which it was laid out. Indeed I very much doubt, whether in case the husband had survived the wife, he could have claimed the property; but without determining how that would be, with respect to an estate so purchased, it appears to me that the husband had no control or command over the money. It was obviously considered by the parties as money in which the wife only had an interest, and the executors very prudently took care that it was secured to her in such a way as to make her a provision, without any control on the part of the husband, and to exempt it from any engagements into which he might enter.

BAYLEY, J.—It is clear that husband and wife may pay the wife's money.

HOLROYD, J.—As the evidence was explanatory of, and not contradictory to the deed, I think it was admissible.

LITTLEDALE, J., concurred.

Rule refused.

Tuesday,  
November 15.

GARRETT and BODENHAM, surviving partners of  
PHILLIPS v. HANDLEY (a).

Where a  
guaranty was  
given personally and individually to one

THIS was an action of assumpsit on a guaranty. The first count of the declaration stated, that on the 12th

(a) See *Garrett v. Handley*, ante, vol. 7. 319.

of several partners in a firm:—Held, that an action might be maintained in the names of all the firm, if it appeared that the guaranty was intended for the benefit of all.

*February*, 1818, by a certain letter written and addressed by defendant to plaintiff, *John Garrett*, on behalf of himself and *Charles Bodenham* and *Robert Phillips*, in consideration that plaintiffs and their deceased partner, at the request of the defendant would advance to one *T. Gibbons* the sum of 550*l.* to enable him to discharge immediately the sum of 550*l.*, for which he had become security for one other *T. Gibbons*; defendant promised plaintiffs and their deceased partner, that provision should be made for repaying plaintiffs and their deceased partner the said first-mentioned sum of 550*l.*, under a certain arrangement then going on for the settlement of all the concerns of the said first-mentioned *T. Gibbons*. It was then averred, that plaintiffs and their deceased partner did immediately after making that promise, to wit, on the said 12th *February*, advance and pay, and cause to be advanced and paid to the said first-mentioned *T. Gibbons*, the said sum of 550*l.* for the purposes aforesaid, and that although a reasonable time for the defendant to have caused provision to be made for the repayment of the said sum of 550*l.* had long since elapsed, and although *T. Gibbons* had not paid the same, yet the defendant had not made any provision for repaying the same under the arrangement or otherwise. There were other counts, not necessary to set out. Pleas, first, non-assumpsit, and second, the Statute of Limitations. At the trial before *Burrough*, J., at the last assizes for the county of *Hereford*, the guaranty relied upon was in the following terms:—"To Mr. *John Garrett*. Sir, I understand from Mr. *Gibbons*, that you had the goodness to consent to advance 550*l.* to discharge immediately a like sum for which he became security for his cousin Mr. *T. Gibbons*, upon my assurance, which I hereby give, that provision shall be made for repaying you this sum under the arrangement now going on for the settlement of Mr. *Gibbons's* concerns. I am, &c., *T. Handley*."

On the faith of this letter, *Bodenham* and Co. advanced the sum of 574*l.* to Mr. *Gibbons*. Several letters written

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between the 8th *January* and 10th *March*, 1820, were put in for the purpose of shewing, that although in terms the guaranty was given to *John Garrett*, one of the plaintiffs individually, yet that it was intended for the benefit of the firm of *Bodenham* and Co., and that all the partners were jointly interested in the money advanced. Two objections were taken on the part of the defendant; first, that the letters relied upon did not prove that the guaranty was meant for the benefit of *Bodenham* and Co., but *John Garrett* only; and second, that at all events the action ought to have been brought in the name of the person to whom the guaranty was personally given. The learned judge left the first point to the jury, but reserved the second for the Court, and the jury found for the plaintiffs, damages 486*l.*, with liberty to the defendant to move to enter a nonsuit.

*Jervis* now moved for a rule nisi to enter a nonsuit or to arrest the judgment, and contended that as the guaranty had been given to Mr. *John Garrett* personally and individually, the action ought to have been brought in his name alone. [*Bayley, J.* You may bring an action in the name of the person with whom the contract is entered into, or in the names of those who are interested in it. This is the rule as to principal and agent. The action may be brought in the name of either]. A contract of this nature must not be taken beyond what it imports on the face of it; it must be construed strictly. At all events the correspondence produced at the trial did not shew that the guaranty was given for the benefit of the firm of *Bodenham* and Co.; and if not, then there can be no doubt as to the first point.

*The Court* took time to look into the letters produced at the trial, and now on this day,

ABBOTT, C. J., said:—We have read the correspondence

in this case, and we think it sufficiently imports that the guaranty was intended for the benefit of the whole firm, and not for *J. Garrett* individually. This being so, we think, that the action is well brought in the names of the firm, although the guaranty was entered into personally with only one partner.

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Rule refused.

The KING v. The INHABITANTS of the County of DEVON.

Wednesday,  
 Nov. 16th.

THIS was an indictment against the defendants for not repairing and maintaining a county bridge. The indictment stated, that on the 10th *February*, in the fourth *Geo.* 4, there was, and from thence hitherto hath been, and still is, a certain common and public bridge, commonly called *Dart Bridge*, lying and being in the parishes of *Buckfastleigh* and *Ashburton*, in the said county, being a common highway leading from the city of *Exeter* unto and over the said bridge to the town of *Plymouth* in the said county, for all the subjects of the king, on foot and on horseback, and with their horses, coaches, carts, and carriages, upon and over the same bridge, to go, return, pass, ride, and travel, at their will and pleasure, freely and safely, without any obstruction, hindrance, or impediment whatsoever; and that the said common and public bridge, on the 10th *February* in the year aforesaid, and continually afterwards, until the day of taking the inquisition at the said parishes of *Buckfastleigh* and *Ashburton* in the said county, was and yet is ruinous; broken and dangerous, and in great decay for want of needful and necessary upholding, maintaining, amending and repairing the same, and the said common and public bridge during all the time last-mentioned, was, and yet is too narrow, so that the subjects of the king, in, upon, and over the said bridge on foot, and with horses, coaches, carts, and carriages, could not and cannot pass and repass, ride and travel, without great


The inhabitants of a county are not liable to widen a public bridge, by force of their obligation to repair it.

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danger of their lives and the loss of their goods, as they ought to do, but were and yet are, greatly obstructed, stopped, and hindered, in the going, returning, and passing, riding and travelling upon and over the same common public bridge, and during all the time aforesaid were and yet are in great peril, hazard, and danger, of being overturned in the said carts, coaches, and carriages, and of being killed, owing to the narrowness of the same, to the great damage and common nuisance of all the subjects of the king, upon and over the said bridge on foot, and with their horses, coaches, carts, and other carriages, about their necessary affairs and business, going, returning, passing, riding and travelling, against the form of the statute in that case made and provided, and against the peace, &c.; and that the inhabitants of the county of *Devon*, of right have been, and still of right are bound to repair and amend the same common bridge, so as aforesaid being broken, ruinous, too narrow, and in decay, and to make the same safe and secure for the said subjects, when and so often as it becomes necessary. Plea, not guilty.


On special verdict found by the jury, the facts of the case were these:—The bridge called *Dart Bridge* in the indictment mentioned, on the 10th *February*, in the 4 *Geo. 4*, was, and from thence hitherto hath been a common and public bridge, for all the liege subjects of the king, on foot and on horseback, and with their horses, coaches, carts and carriages, upon and over the same bridge, to go, return, pass, ride and travel at their free will and pleasure, freely and safely, without any obstruction, hindrance or impediment whatsoever. The said common and public bridge, on the day and year last aforesaid, and continually afterwards, until the day of taking the inquisition, was not ruinous, broken, dangerous, and in great decay, for want of necessary upholding, maintaining, amending, and repairing the same; but it was on the day and year last aforesaid, and continually afterwards, until the day of taking the inquisition, and still is too

narrow, so that the liege subjects of our lord the king, in, upon, and over the same bridge, on foot and with horses, coaches, carts and carriages, could not, and cannot pass and repass, ride or travel, without great danger of their lives, and the loss of their goods, as they ought to do, but were, and yet are, greatly obstructed in going, returning, passing, riding and travelling, over the same common public bridge, and during all the time aforesaid were, and yet are, in great peril, hazard, and danger of being overturned in the said carts, coaches, and carriages, and of being killed, owing to the narrowness of the bridge; but the bridge on, &c., and during all the time aforesaid, was, and still is, as wide as ever it was, and the inhabitants of the said county of *Devon* of right have been, and still of right are, bound to repair and amend the said common public bridge(a).

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*P. Williams*, for the crown. At common law the inhabitants of a county are bound to repair and keep in repair county bridges. The question then is, whether the obligation of *widening* bridges, so as to enable the king's subjects to pass and repass without danger, is not one of the incidents of that liability. If this be not an incident of the liability, then the reason of the liability may in many cases be wholly inadequate to its object. The principle on which the liability is bottomed, is the obligation of counties to enable the king's subjects to pass and repass without danger, and to give that facility of communication between all parts of the kingdom, which public and private convenience requires. If this principle be irrefragable, then common sense requires that it should be applied co-extensively with the prevailing necessities or habits of mankind. Those who argue upon the wisdom and reasonableness of the general principle, must at the same time concede that the consequences now insisted upon, necessarily flow from it; otherwise, the principle would in itself be absurd,

(a) This prosecution was instituted by the Post-Master-General.

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nugatory and impracticable. This is not a new doctrine; for in *Rex v. The Inhabitants of Cumberland*(a), Lord Kenyon said, "that the Court in a former stage of that cause, had intimated a strong opinion, that if a bridge used for carriages, though formerly adequate to the purposes intended, were not now of sufficient width to meet the public exigencies, owing to the increased width of carriages, the burden of widening it must be borne by those who are bound to repair the bridge. And upon that question there cannot be entertained much doubt." Applying that doctrine to the present case, it will be found perfectly consentaneous with the facts here found. The special verdict has established beyond all dispute, that from time immemorial there has been a public way, for carriages of all descriptions to pass and repass over the bridge in question, but that it has now become inadequate and insufficient for the purposes of public convenience and necessity. Then upon this state of facts the conclusion follows, that though formerly the bridge might have been adequate to the purposes intended, yet as it is not now of sufficient width to meet the public exigencies, owing to the increased width of carriages, the burden of widening it must be borne by those who are bound to repair it. [*Bayley, J.* The special verdict does not find this to have been an immemorial bridge for carriages. All it finds is, that from the 10th *February*, in the fourth year of the *present* reign, it was a public bridge for carriages. Suppose at the commencement of the present reign, a private individual had erected, at his own expense, a bridge over the river *Dart*, and had dedicated it to the use of the public, and it turned out that the bridge was too narrow for general use, would that throw upon the county the obligation of widening it? There would be an obligation to repair; but is not *widening, building?*] If it be conceded, of which there can be no

(a) 6 T. R. 194. 3 B. & P. 356, S. C. in error, where Lord *Eldon* expressed considerable doubts upon the question now at bar, and the case was ultimately decided on another ground.

doubt, that at common law, there is an obligation on the county to *repair* a public bridge, it would follow, that in many cases the obligation would be wholly inoperative, unless that obligation was also extended to widening, or adapting it to purposes of public utility. The immediate cause of the inadequacy of this bridge, is its narrowness. Then is not the county bound to repair or *amend* it in such a way as shall make it fit for the objects originally intended? The liability to repair bridges, is a mixed question of customary and statute law; and the question is, whether the inhabitants are not bound to widen for the same reason that they are bound to repair a bridge. Lord *Coke*, in his *Commentary on the Statute of Bridges*(*a*), says, "That at common law individuals or corporations are bound to repair bridges by reason of their tenure or prescription; but that if none were bound to the reparation of the bridge by the common law, the whole county, that is, the inhabitants of the county or shire wherein the bridge is, shall repair the same; for of common right the whole county must repair it, because it is for the common good and ease of the whole county. Also, if a man make a bridge for the common good of all the subjects he is not bound to repair it." Therefore, whether right or wrong this obligation exists, and cannot now be disputed. But this common law obligation may be traced beyond the *Norman* conquest; and shews that the liability to repair is not to be confined to the narrow sense of keeping it up in its original state. *Pontis reparatio*, *arcis constructio*, *expeditio contra hostem*, constituted the *trinoda necessitas*, to which all lands in *Saxon* times were subject. These three obligations have a reciprocal relation, and are dependent on each other, and if the "*pontis reparatio*" did not include a sufficient *widening*, the "*expeditio contra hostem*," might be perfectly nugatory. If this was the law before the Conquest, let it be supposed, that in those times a bridge, by reason of its narrowness, was insuffi-

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cient for the transportation of the *Saxon* monarch's wag-gons and military stores, would it be any answer on the part of the persons liable to repair, to say that the bridge was sufficient a hundred years before? The reply no doubt would have been, "No, you are bound to keep the bridge in such a state as to render it fit for present purposes of public convenience; it matters not that you have never done so much before, you are bound to put it into such a state, as to render it safe, easy, and commodious for all purposes of present public utility; and unless you comply, force must be resorted to, if fair means are not sufficient." This is the interpretation of the law which reason, fortified by power, would impose upon the monarch's reluctant subjects. It is true, that in the confirmation of *Magna Charta* by 9 *Hen. 3*, c. 15, it is declared "Nulla villa, nec liber homo distringatur, facere pontes aut riparias nisi qui ab antiquo et de jure, facere consueverunt tempore Henrici regis avi nostri;" but that only shews, that the obligation rested where custom had fixed it, and the object was to restrain the monarch from calling upon his subjects to build a bridge where there was not one before. The word "facere" cannot mean any thing less than "repair." As here used, it means that nobody shall be called upon to do any thing to a bridge, but what by custom he was bound to do. [*Bayley, J.* What is there in the present case to shew that there is any obligation on the part of the county to repair this bridge? It does not appear that there was any passage over, or through the water until this bridge was made]. That remark might be made with equal pertinence to half the public bridges in the kingdom; and if it were to have any weight, there must be a separate rule of law for ancient bridges, and another for those of which the origin can be ascertained. The obligation, however, to repair, arises at common law, and under the Statute of Bridges, and when once a bridge is built *de facto*, and dedicated to the public, the liability attaches, whether it be an ancient or modern

bridge. As to the meaning of the word "reparatio," it will be found upon reference to glossaries to be equivalent to re-edificatio, and according to liberal construction, it may mean the widening of a bridge already erected. In 13 *Rep.* 33, it is said, that "A bridge shall be levied by the whole county, because it is a common easement for the whole county," 10 *Edw.* 3, 20 *b*; and in *Dalton's Justice*, c. 16, p. 58, it is said, "By common right, bridges shall be *amended* by the whole county, for it is for their common good and ease." The case of the king's highway is analogous to this. If the king's highway from its narrowness be impassable, or any obstructions exist, it may be indicted, *Reg v. Stretford* (a). [*Abbott*, C. J. There the analogy does not hold good, for by statute, highways must be 30 feet wide.—*Bayley*, J. In many places ancient houses are standing, so as to make the highway narrow and incommodious; do you mean to argue that in such cases the parish would be bound to remove the obstruction? For instance, the north end of *Chancery Lane* is so narrow that two carriages cannot pass abreast; do you mean to contend that the parish of *St. Andrews* could be compelled to purchase and pull down the houses which occasion the obstruction?] It is not necessary to push the argument to that extent. All that is contended for is, that the rule of law by which counties are liable to repair bridges, should be construed liberally and adequately, so as to give effect to the reasonable intendment of the law. The reason of the liability being that it is for the common benefit of the whole county; it follows that, if it be for the common benefit that a bridge should be widened, the county should be at the expense of doing what is necessary for that purpose. Unless this liberal interpretation is put upon the liability, public convenience must be sacrificed, and all the king's subjects will thereby sustain a prejudice contrary to the policy of the law. The post-office, from which the king derives so considerable a revenue, is

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(a) 2 *Ld. Raym.* 1169.



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also deeply interested in this question. [Abbott, C. J. What have we to do with the post-office? Can we lay down a different rule of law with respect to mail coaches, from that applicable to all other carriages?] But a liberal interpretation of the law with reference to the beneficial purposes for which it was intended, will lead to a fair distribution of the burden of repairing according to the method prescribed by the old law, instead of confirming the necessity of resorting to another mode of taxation which may possibly fall heavier upon the county of *Devon*. All that is required is, that the bridge shall be reasonably fit for the ordinary purposes of mankind, and commensurate with the safety of the king's subjects in passing with their carriages from one part of the kingdom to another; and to this extent, a liberal interpretation of the law will make the county liable.

*Tancred*, contra, was stopped by the Court.

ABBOTT, C. J.—A similar question to this came lately before the Court, in a case from the county of *Lincoln*(a), and we then expressed a strong opinion that a county was

(a) *Rex v. The Inhabitants of the county of the city of Lincoln*. E. T. 5 Geo. 4. Monday, 10th May, 1824. That was an indictment for not repairing and widening a public bridge in the county of the city of *Lincoln*. At the *Lent* assizes, 1824, the defendants were found guilty. *Denman* moved for a new trial on the ground, that at common law there was no obligation on the part of a county to widen a public bridge. In the case in question, there was no evidence that the bridge was out of repair, ruinous, or decayed. The sole question raised at the trial was, whether the bridge was sufficiently wide for the purposes of traffic? It was proved to be as wide as ever it had been, and the point left to the jury was, whether it was wide enough for ordinary purposes, and the defendants were found guilty.

THE COURT suggested that there was no case to be found in which it had been held that a county was liable to widen a public bridge, and intimated a strong inclination of opinion, that such a liability did not attach as an incident to the obligation of repairing.

*Denman* took a rule nisi for a new trial, but the case has not since been discussed.

not bound to make a bridge wider than ever it had been before. That case never went any farther, probably the parties acquiescing in the opinion which was then plainly expressed by the Court. The question now is, what extent of charge can by law be cast upon the inhabitants of a county. We must look to that point only, and not merely to the convenience of the public, in the consideration of the subject. The case has been argued before us with great learning and ability, but not one single authority (except a dictum of Lord *Kenyon*) has been cited to shew, that a county can be compelled, even in the case of an ancient bridge, to make a bridge of greater width than it was before. There are many bridges in the country, that were formerly wide enough for the little traffic which then existed, but which are now extremely inconvenient, and much too narrow with reference to the traffic which has taken place in modern times; and yet there is no instance to be found, in which the inhabitants of a county have been compelled to accommodate their bridges to existing circumstances, and render them wide enough for the purposes of the public; that is, to add something which did not exist before. Now if we should lay down the law to be, that the inhabitants of a county may be compelled to widen a bridge, I am utterly unable to say why we should not be at liberty to say that the inhabitants of a parish are liable to widen a public highway. To what extent of charge that proposition would go, and the inconvenience it would give rise to throughout the country, I need not enlarge upon. With respect to highways, the inhabitants of a parish, as such, have no power, except by act of parliament, to purchase land at their own expense for the purpose of widening a narrow and inconvenient road; but if they could be compelled to buy land for such a purpose, I know not why they should not be compelled to buy houses. The instance of a narrow street in *London* was mentioned in the course of the argument, to illustrate the extent of such an obligation. If such a proposition

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could be maintained, I cannot see why the inhabitants of the parish of *St. Andrew's, Holborn*, might not be compelled to purchase the houses on one side of the north end of *Chancery Lane*, take them down and make room for two carriages to pass, which they cannot do at present. That which was said by Lord *Kenyon* in *Rex v. The Inhabitants of Cumberland*, is entitled certainly to the greatest weight; but still in the absence of all other authority, I think it is not in the power of this Court to say, that the inhabitants of a parish or county are bound to bear greater burdens than have hitherto been cast upon them respectively; and therefore I think that the inhabitants of the county of *Devon*, are not bound to widen this bridge. If public convenience renders it necessary that it should be done, it must be done by a higher authority than this Court possesses.

BAYLEY, J.—If there were any sound analogy between the liability of a parish to repair roads, and a county to repair bridges, the case of *Regina v. Stretford* would be an authority in point to shew that the inhabitants of a county are not liable to widen a bridge. There the indictment was, that the road was so muddy and narrow, that the queen's subjects could not pass along it without danger of their lives, and that the inhabitants had time out of mind repaired it, and ought to repair it as often as need was. There was a verdict for the crown, and judgment, and a writ of error being brought to reverse it, the exceptions taken were, first, that the time at which the way was laid to be muddy, was the 11th *January*, which was in winter, and that it was no offence for the highways to be dirty in winter; and, second, that the allegation that the way was so narrow that the queen's subjects could not pass, furnished no ground for indicting the parish, because the parish had not by law the means of widening it, for they had no right to take adjoining land in order to add to the road and make it wider than it was originally made; and

the indictment was held bad for want of saying that the way was out of repair. In that case, *Powell, J.*, said, "that the saying that it was so narrow that the queen's subjects could not pass, was repugnant to its being a king's highway, for if it had been so narrow, people could not have passed there time out of mind." When a road is originally made, it may happen, that the proprietor of the land over which the road passes, which he dedicates to the use of the public, has nothing on the one side or the other, and if the public take to it, they take to it subject to the inconveniences to which that slip of land is liable; and the parish, under such circumstances, can have no power to widen the road. But I think the analogy between the case of a road and a bridge, is not so perfect as is supposed; because, though the parish has not the power of taking the adjoining land to widen a road, yet the county may widen the bridge by extending it in the open air. Independently, however, of the case of *Regina v. Stretford*, it is clear, that circumstanced as this bridge is, there is no obligation on the county to widen it. Is a county bound to *make* a bridge where there was none before? There is no authority which says that it is so bound. The passage cited from *Magna Charta*, shews that there is no obligation on the inhabitants of a county to *make* one; and there is not a single instance of an indictment to be found against a county for not *making* a bridge. The obligation of a county to repair a bridge, arises out of the adoption of the bridge by the public, with the concurrence of the inhabitants. Where a bridge is built by an individual, with high roads attaching to each end of it, and the public think fit to take to it, with the acquiescence of the inhabitants of the county, the county comes under the obligation of keeping it in repair; but it does not therefore follow that the inhabitants are bound to widen it. Where a bridge is dedicated to the public in the state in which it is, and the public take to it in that state, with the concurrence of the county, the inhabitants must keep it in repair, in the state in

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which it then was, but that is all. Now in the present case the record only states, that in the 4th of *George 4*, this bridge existed, but whether there had ever been a bridge there before, both the indictment and the special verdict are silent. Nothing more is stated than that at that time there was a bridge, and that the bridge was so narrow that the liege subjects of the king could not pass without danger of their lives and loss of goods; but as the public thought fit to take to it in the state in which it was originally given to them, I think there is no obligation on the county to place it in a state different from what it was when it was originally dedicated. For these reasons I am of opinion, that as the county is not bound to *make*, it is not bound to *widen* a bridge, which is in reality *making*; because quoad the extent of the additional width necessary for public accommodation, we should be compelling the county to make the bridge, if we were to hold the inhabitants liable to this indictment.

LITTLEDALE, J. (a). I am of the same opinion. The obligation imposed by the common law upon counties is only to repair *existing* bridges; but if we were to hold that the inhabitants of the county are bound to *widen* an existing bridge, there would be just as much reason to call upon them to make a new bridge where there was none before. It is clear that by law there is no obligation on a county to make new bridges where none previously existed; and if so, it follows that the inhabitants cannot be called upon to widen old ones, because pro tanto, that would be making new bridges. If the exigencies of the public, arising from the increase of traffic between different parts of the kingdom, require new bridges, or any alterations in the width of old ones, those objects can only be effected by the authority of the legislature. If the common law required the inhabitants of a county to widen an old bridge, they must have the means of doing so, and

(a) *Holroyd*, J., was in the Bail Court during the argument.

for that purpose they must have the means of purchasing lands upon which to rest the ends of the bridge, and also to purchase the interests of those who might have fisheries in the river, and whose rights would be interfered with by extending the piers and abutments. I apprehend that the county at large would have no right to expend money for such purposes, however necessary. In many places, particularly in towns, it would be impossible to widen bridges, without pulling down houses at each end; and it might happen, that persons who had valuable manufactories so situated, would not chuse to part with such property, but at such extravagant prices as the county could not find means of paying. As the county, therefore, has not the means of forcing parties to part with their property at all events, for such a purpose, that affords a pretty strong ground for saying, that at common law the county is under no obligation to widen a bridge. As common law there is no obligation upon persons to sell their property, whether it be waste or cultivated land, or land upon which there are buildings. It is true that, by the statutes 43 Geo. 3, c. 59, and 54 Geo. 3, c. 80, the inhabitants of a county may compel the sale of land and buildings, for the purpose of widening a bridge, but at common law there is no such power. I therefore agree in thinking, that judgment must be given for the defendants in this case.

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Judgment arrested (a).

(a) Vide *R. v. West Riding of Yorkshire*, 5 Burr. 2594. 2 Sir W. Bl. 685, S. C. *R. v. Id.* 2 East, 342. *Id.* 356. *R. v. Kent*, 13 East, 220. *R. v. Id.* 2 M. & S. 513. *R. v. Salop.* 13 East, 95. *R. v. Bucks.* 12 East, 192. *R. v. Lindsey*, 14 East, 317. *R. v. Kerrison*, 3 M. & S. 526. *R. v. Northampton*, 2 M. & S. 262.

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Taking a butcher's stall, attached to the freehold, in an inclosed market place, to which the pauper has access only on the market days, but of which he has the exclusive possession on those days, is, it seems, coming to settle on a tenement within the meaning of the 13 & 14 Car. 2, c. 12, s. 1; but he can be considered as an occupier, on the market days only; and therefore where the pauper occupied such a stall for 38 market days, during a period of four months:—  
Held, that he gained no settlement.

BY an order of two justices, *Anne*, the wife of *John Dight*, (a prisoner under confinement in *Reading* gaol), and their seven children, were removed from *St. Mary*, in *Reading*, to *Caversham*, in the county of *Oxford*. On appeal, the sessions confirmed the order, subject to the opinion of this Court, on the following case:—

In the year 1817, the pauper's husband occupied a tenement in the parish of *Caversham*, of the yearly value of 9*l.* 19*s.*, paying rent after that rate, upon which he resided three quarters of a year. During the time he so occupied this tenement, he agreed, being a butcher by trade, with the collector of the tolls of *Reading* market, for the occupation of one of the several stalls in the market, for which he was to pay 2*s.* 6*d.* per week. The stall used by the pauper's husband, under this agreement, was like the others, a permanent building, furnished with a door capable of being locked, and the key was always in his possession, but he had a right of access to the stall only on *Wednesdays* and *Saturdays*, being market days. At each extremity of the market are iron gates, which are closed and locked, except on *Wednesdays* and *Saturdays*, and, when locked, preclude all access to the stalls, except by permission of the collector, which was occasionally granted to the pauper's husband. He continued to use the stall from the 1st of *November*, 1817, to the 14th of *March*, 1818, paying the 2*s.* 6*d.* at the end of each week, or fortnight, according to convenience, and occupying at the same time the tenement in *Caversham*. The sessions confirmed the order, subject to the opinion of this Court, upon the question, whether the renting and occupation of the stall, in the manner and during the period aforesaid, was such a renting of a tenement for 40 days, as might be

coupled with the other tenement, at 9*l.* 19*s.*, so as to confer a settlement in the parish of *Caversham*.

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*Talfourd*, in support of the order of sessions. There are two points for the consideration of the Court; first, whether the stall described in the case is a tenement; and second, whether, assuming it to be a tenement, there has been an occupation of it for 40 days, so as to confer a settlement, when coupled with the other tenement of 9*l.* 19*s.* First, the stall was affixed to the freehold, as a permanent building, having a door, and capable of being fastened with lock and key, to the exclusion of all other persons, and therefore it possessed all the characteristics of a separate tenement, necessary to confer a settlement. This case bears no analogy to *Rex v. Dodderhill* (a), where the pauper had a license to work in a mill, at any two pointing places he chose, in a particular part of the building. That was merely the case of an occupation of personal property, no way connected with any part of the freehold. This case also differs from *Rex v. Hammersmith* (b), where the pauper rented the grinding of so many loads of corn. Secondly, if there be nothing in the nature of the building which negatives the definition of a tenement, there has been such an occupation as will confer a settlement. It will be said on the other side, that the pauper's husband had the occupation of the stall only on the market days, between the 1st of *November* and the 14th of *March*, and consequently, as they amounted only to 38, there was not a sufficient occupation to satisfy the words of the statute 13 and 14 *Car.* 2. But it is clear that he had the exclusive enjoyment of the tenement, such as it was. He kept the key, and had such a possession as would have enabled him to maintain trespass; and though he did not actually use the stall more than twice a week, still he must be considered as being in the occupation during the whole interval between the 1st of *November* and 14th of *March*. Upon this part

(a) 8 T. R. 449.

(b) *Id.* 450 n.



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of the argument he cited *Rex v. Stoke(a)*, and *Rex v. Seamer(b)*.

*Bolland and Shepherd*, contra. First, it cannot be said that here was an occupation of the tenement for 40 days. The case finds expressly that the pauper had access to the stall only on market days, which amounted only to 38, during the period in question. In the intervals, the market place was locked up by the toll-collector, who kept the key, and excluded the pauper, except on those days, and therefore there is no pretence for saying that he had the exclusive occupation from the 1st of *November* to the 15th of *March*. At all events, there must be a *continuous* residence for 40 successive days; a virtual residence is not sufficient. This is the construction to be put on the statute 13 and 14 *Car. 2*, s. 1, and 1 *Jac. 2*, c. 17, and therefore, on this ground alone, the settlement must be negatived. But, secondly, it cannot be said that the pauper came to settle upon this as a tenement within the meaning of the statute. The corporation of *Reading* having built a market place, for the exposure of various commodities to sale, allow the pauper's husband the privilege of occupying a stall on the market days, paying so much a week, but he is denied all access to the stall on other days. There is no demise to him of a tenement. The collector of the tolls had no right to let the stall to him as a tenement. His occupation is solely under a license to expose his meat in the market for sale, paying a weekly toll for his standing. It might as well be said, that the use of an opera box two nights in the week, to the exclusion of other persons during the remainder of the week, would be coming to settle upon a tenement within the meaning of the 13 and 14 *Car. 2*.

ABBOTT, C. J.—Admitting this to be a hiring of a tenement, still I think it can only be considered as a hiring for

(a) 2 T. R. 451.

(a) 6 T. R. 554.

the market days, and therefore as the pauper's husband did not occupy during 40 market days, I am of opinion that no settlement was gained.

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BAYLEY, J.—I think the stall must be considered as a tenement within the 13 and 14 *Car. 2*, but there being an occupation for 38 days only, no settlement could be gained under the circumstances stated in the case.

LITTLEDALE, J., (a) concurred.

### Order of Sessions quashed.

(a) *Holroyd, J.*, was in the Bail Court.

### The KING v. JOHN JARAM.

Wednesday,  
Nov. 16th.

BY an order of general quarter sessions in and for the *East Riding* of the county of *York*, held on the 11th *January*, 1825, it was ordered “that *John Jaram*, the acting bailiff of the seigniority or wapentake of *Holderness*, in the *East Riding* of the county of *York*, be fined 10*l.* for refusing, contrary to the duty of his office, and to ancient usage, to summon the jury, from the said seigniority or wapentake, to attend at the general quarter sessions of the peace, held at *Beverley*, for the said *Riding*, on the 11th day of *January* 1825, he, the said *John Jaram*, having been duly required so to do by warrant from the sheriff of *Yorkshire*, dated the 30th day of *December*, 1824.”

A charter of *Car. 2*, gave to the lord of an ancient liberty the execution of all writs, processes, and precepts of his majesty, within the liberty, and contained a non intro-mittat clause, restraining the sheriff from entering, “unless it touched his majesty or his crown, and unless upon default of the bailiffs and officers” of the lord:—Held, that by virtue of this

A rule nisi having been obtained for quashing the above order, the facts disclosed in the affidavits in support of the rule were these:—Sir *Thomas A. Clifford Constable*, of *Burton Constable*, in *Holderness*, bart., by virtue of several

charter and the provisions of stat. 27 *Hen. 8*, c. 24, s. 7, the lord's bailiff was bound to obey the sheriff's precept for returning jurors from the liberty to the quarter sessions; and that for disobedience to such a precept, the justices at sessions had jurisdiction to impose a fine on the bailiff.

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letters patent under the great seal of *England*, was seised and possessed of the seigniorship or lordship of *Holderness*, in the county of *York*, together with the jurisdictions belonging to the same seigniorship or lordship. By the last of the letters patent, which were dated on the 31st *December*, in the 16 *Car.* 2, after reciting among other things certain former letters patent, granted by *Phil.* and *Mar.* to *Henry* Earl of *Westmoreland*, and by *Car.* 1, to *Henry* Constable, Viscount *Dunbar*, and that the liberty of *Holderness* was an *ancient* liberty, and that the lords thereof were bailiffs of the same liberty, and had and exercised returns and executions of writs and processes within the same liberty, and other rights and franchises therein; *Car.* 2, did, among other things, give and grant to *John* Viscount *Dunbar*, his heirs and assigns, that he and they should have within the said liberty of *Holderness*, the return and execution of *all and singular writs, processes, mandates, warrants and precepts*, of his said majesty, his heirs and successors, by the proper bailiffs, officers, and ministers of the said *John* Viscount *Dunbar*, his heirs and assigns, from time to time there to be returned, done, and executed; so that no sheriff of his majesty, his heirs or successors, should enter into the liberty of *Holderness*, or into any town, village, leet, or hamlet, within the whole wapentake or hundred of *Holderness*, to do or execute any thing belonging to his office, *unless it touched his said majesty or his crown*, and unless upon the default of the bailiffs and officers of the said Viscount *Dunbar*, his heirs or assigns, with the special writ of non omittas in that behalf first had and obtained. And the king thereby, for himself, his heirs and successors, did finally enjoin and command his sheriff, and the sheriff of his heirs and successors of the county of *York* for the time being, and every of them, upon all and singular writs, processes, mandates, warrants and precepts delivered, or to be delivered into their hands for ever thereafter, for any execution thereon to be made or done within the said liberty of *Holderness*, or within any

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town, village, leet, or hamlet, within the whole wapentake or hundred of *Holderness*, immediately and without delay, after the receipt of every such writ, process, mandate, warrant or precept, to make his and their mandates, warrants or precepts thereupon, and to direct the same to the bailiffs, officers, and ministers of the said Viscount *Dunbar*, his heirs and assigns, of his liberty aforesaid, for the time present then being, and to no other person or persons whatsoever, and to command the due execution thereof to be made by the aforesaid bailiffs, officers, and ministers of the said Viscount *Dunbar*, his heirs and assigns, from time to time as aforesaid, "*unless it touched his said majesty or his crown, and unless upon default, and with the special writ of non omittas as aforesaid.*" The affidavits then stated that one *Iveson* executed the office of deputy chief bailiff of the said seigniorship or lordship of *Holderness*, and the defendant *Jaram*, that of under acting bailiff of the said seigniorship or lordship; and that he, *Iveson*, had been advised that, according to the true construction of the letters patent, the return and execution of writs and processes so given and granted by the letters patent, was confined to civil process; and that he, the deputy chief bailiff, thought it proper for the rights and interests of Sir *T. A. C. Constable*, to order the defendant *Jaram*, no longer to execute the precepts of the sheriff to summon jurors within the said liberty of *Holderness*, to the intent and purpose that the question might be fairly tried between Sir *T. A. C. Constable* and the sheriff, whether the bailiffs of Sir *T. A. C. Constable* were bound to obey and execute such precepts of the sheriff; that at the quarter sessions of the peace for the said *East Riding*, on the 11th *January* last, a complaint was made to the magistrates there assembled, by the under-sheriff for the *East Riding*, against *Jaram*, for disobedience to the precept of the sheriff, which had been previously to the said sessions directed to him, *Jaram*, to summon jurors from the liberty of *Holderness*, to attend at the same sessions; and it was at the same time urged by

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the under-sheriff, that a fine should be imposed by the magistrates upon *Jaram* for such disobedience ; that the chief bailiff on the part of *Jaram*, contended before the magistrates, that *Jaram* had not disobeyed any order of the Court, and that it was not therefore competent for the Court to fine him, as no contempt had been committed ; but the Court nevertheless made the order in question. The deputy clerk of the peace for the *East Riding* made an affidavit, in which he stated, that since 1787, when he was appointed to that office, the bailiffs appointed by the high sheriff for the time being, as well as the bailiffs appointed by the Bishop of *Durham*, in right of his see, for the wapentake or liberty of *Howdenshire*, and by Sir *T. A. C. Constable*, bart., and his ancestors, for the wapentake or liberty of *Holderness*, both in the said Riding, had, during the time that he had been deputy clerk of the peace as aforesaid, regularly attended the general quarter sessions, making returns of the jurors resident and summoned within their respective divisions, and remaining in court in their character, as officers of the court during all the time the sessions were held, which usually continued two days or more, until the *Epiphany* general quarter sessions, in the year 1823, when *John Jaram* was fined the sum of 5*l.* for being absent without leave of the Court. It was further stated, that in the *North Riding* there were several bailiffs appointed by lords of liberties, independently of the high sheriff of the county, and that such bailiffs attended the general quarter sessions for that Riding, in the same manner, and for the same time, as the bailiffs who were appointed by the high sheriff.

*Coltman* now shewed cause against the rule for quashing the order of sessions. The object of this proceeding is to try the question, whether the lord of the franchise of *Holderness* is, or is not, bound to obey the process of the high sheriff for summoning jurors within his liberty to attend at the quarter sessions for the *East Riding* of the

county of *York*. This question turns upon the statute 27 *Hen. 8*, c. 24, s. 7, by which it is ordained, "that all stewards, bailiffs, and other ministers of any liberties or franchises, which *in times past* have used, or ought to attend upon the justices of assize, justices of gaol delivery, and justices of the peace at large in any county, shall be attendant to the justices of assize, justices of gaol delivery, and justices of peace of the same shires wherein such liberties and franchises be, and make due execution of all process to them to be directed, for ministration of justice within such liberties or franchises; and that also, all such bailiffs, or their deputies or deputy, shall give their attendance and assistance upon the sheriff, together with the sheriff's bailiffs, at all courts of gaol delivery from time to time, for execution of prisoners according to justice." By this statute, therefore, the bailiffs of franchises are bound to obey all process to them to be directed, and are required to attend at all courts of gaol delivery, for ministration of justice within such franchises. Two objections will, however, be made on the other side, by way of exemption; first, that the bailiff of this franchise is bound only to execute *civil* process, and reliance will be placed on the *non intromittat* clause in the letters patent of *Car. 2*; and, second, that the statute 27 *Hen.* applies only to *ancient* liberties and franchises, in which the stewards, bailiffs, &c., *in times past* have been used to attend upon the justices, and to execute process directed to them. Now as to the first objection, no instance is to be found of such a limited franchise of *retornum habendum*. Nothing can be more general than the words of the letters' patent. The king did among other things give and grant to *John Viscount Dunbar*, his heirs and assigns, that he and they should have the return and execution of "*all and singular writs, processes, mandates, warrants, and precepts.*" The *non intromittat* clause following, "that no sheriff should enter the liberty to execute any thing belonging to his office, unless it touched his said majesty or

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*his crown*, and unless upon the default of the bailiffs and officers of the said Viscount *Dunbar*, his heirs or assigns, with the special writ of non omittas in that behalf first had and obtained," is nothing more than an exception which the law itself would imply, and then the rule applies " *expressio eorum quæ tacite insunt nihil operatur*." Now it is laid down in *Com. Dig. tit. Retorn. B. 2*, "that on default of the bailiff, the sheriff may enter a franchise, and therefore, if a bailiff does nothing upon the sheriff's mandate, a writ goes to the sheriff *quod non omittat propter aliquam libertatem*, by the common law." 2 *Inst.* 453. "So, if the bailiff makes an insufficient return, or if the king be party, the sheriff may enter the franchise without a non omittas, as upon process against a felon." *Id.* B. 3. *Plow. Com.* 216 a. 1 *Vent.* 406. It is clear, therefore, that the non intromittat clause in these letters patent, introduces no qualification which would not be implied by the common law itself; and if so, then the very terms of the grant impose upon the bailiff the obligation of summoning the jury within his liberty. But if any doubt existed upon the subject, it is completely removed by the general provision of the 27 *Hen. 8*, c. 24, s. 7. Then, secondly, as to the objection, that this statute applies only to ancient franchises, it must now be presumed that the bailiffs have "in times past" been used and accustomed to attend upon the justices in quarter sessions, and to execute all process directed to them for ministration of justice within the franchise of *Holderness*. It is, at all events, sufficient for the purpose of the present argument; if this was a liberty before the time of 27 *Hen. 8*, and that the usage for the bailiffs to attend the sessions then existed. This must be presumed from what now appears before the Court. In the first place, it is stated on the face of the order itself, that the defendant was fined for refusing, contrary to the duty of his office, and to *ancient usage*, to summon the jury. The affidavits, in the second place, affirm the existence of the ancient usage for the bailiffs of the liberty to


summon the jury and attend upon the sessions; and as such usage is not traversed on the other side, it must be taken as admitted and incontrovertible. No inference can arise from the letters patent themselves, that this was not an ancient franchise prior to the reign of *Hen. 8*, because the first letters patent were granted by *Philip* and *Mary*; and in *Constable's* case (*a*), it is said, that king *Philip* and queen *Mary* were seised of the manor and fee of *Holderness* in their demesne, as a fee in right of the crown, and since the 2 *Ed. 3*, c. 12, the king cannot grant a liberty unless it was anciently created. So that it is clear from the whole of this case, that this franchise must have existed previous to the time of *Hen. 8*. Relying, therefore, upon the extensive words of the letters patent; the express language of the statute 27 *Hen. 8*; and the strong presumptive evidence that this is an ancient franchise, and that the custom stated has existed in times past, it is clear that the defendant was bound to summon the jury from the liberty to attend the sessions, and having neglected so to do, he was guilty of such a contempt as justified the magistrates in imposing the fine in question.

*J. Williams* and *Deacon*, contra. Assuming that the justices at sessions had jurisdiction to make the order in question, still there are such defects upon the face of it, that it could not in point of law be enforced so as to restrain the person of the defendant until the fine was paid. In the first place, it does not appear on the face of the order, that any warrant was delivered requiring him to summon the jury; it might never have reached him, and therefore without more appearing, he could not be in contempt. According to the statute 27 *Hen. 8*, c. 24, s. 7, the obligation sought to be imposed, attaches only on such stewards and bailiffs of franchises as have "in times past" been used to attend the justices and execute process. This must mean such stewards and bailiffs, as had been

(*a*) 5 Rep. 106.

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so used, at the time of the passing of the act of parliament itself. Therefore, from any thing that appears on the face of this order, no such usage appears to have existed in this franchise. The reference to "ancient usage" in the order, must apply to times long since the act; and consequently, in order to bring the statute into operation against the defendant, it ought to have been shewn, that the bailiffs of this franchise had performed these specific duties previous to the 27 *Hen.* 8. But in the next place, what is there to shew, on the face of this order, that this defendant had been summoned and had been heard before the order itself was made? No intendment can supply the want of this statement. It is an incontestible rule of law, that before a penalty can be imposed upon a party supposed to be in contempt, it must be shewn that he has been duly required to do the act, the neglect of which is to bring him into contempt, and that he has been heard in his defence. [*Bayley, J.* What is the practice with respect to fining jurors for non-attendance? Is it not, to swear the summoning bailiff to the fact that he has summoned the juror, and then taking his word, to fine the absentee? In that case the party fined is not heard.—*Abbott, C. J.* It is the duty of the juror to be present, and he will be fined if he is absent]. If the order here had shewn any obligation on the part of the defendant to be present, then it would have been an answer to the objection. [*Bayley, J.* Two grounds of contempt are alleged, first, his refusing to summon the jury out of the liberty; and second, his refusing to attend the court of quarter sessions]. The only ground of contempt for which the fine is imposed is, neglecting to summon jurymen out of the liberty to come and attend the sessions. [*Abbott, C. J.* But if it was his duty to summon the jury, it must also have been his duty to attend at the sessions]. The order does not so say, nor would that be a necessary consequence from his obligation to summon the jury. The order simply says, that he was fined "for refusing, contrary

to the duty of his office and to ancient usage, to summon the jury." So far, therefore, as appears by the order, there was no actual proof that the warrant was delivered to him, nor that he was heard in his defence. He was not bound to attend without summons, and had he been duly summoned, it ought to appear on the face of the order, *Rex v. Benn(a)*. Had he been duly summoned, he might then have been heard, and possibly he could have shewn good cause for not summoning the jury from the wapentake, or that there was some irregularity in the service of the warrant. Coming, however, to the principal point raised in the case, the question is, whether the sheriff of *Yorkshire* is not bound to execute this process himself or by his officers, and not the lord of the seignior of *Hol-derness*, or his bailiff. It is submitted, that the non intromittat clause in the letters patent relates to *civil* process merely, and not to *criminal* process, and that the object of it was to take away from the sheriff and his officers those emoluments which usually arise upon the execution of *civil* process. The sheriff has power to enter the franchise for the purpose of executing writs and processes upon all matters "touching his majesty or his crown," which clause clearly relates to criminal matters, and not to matters purely civil, and upon which emoluments would arise. Summoning jurors to attend a gaol delivery comes under the description of criminal process, and therefore the bailiff of the liberty was not bound to obey the precept of the sheriff. The duty of summoning the jury lay upon the sheriff and his officers. [*Abbott, C. J.* The exception in the non intromittat clause, is mere surplusage, for I take it to be perfectly clear, that upon any default of the lord's bailiff or his officers, the sheriff might enter to execute process]. But at all events the bailiff was not bound to obey the precept of the sheriff. If bound at all, it must be process issued directly by the Court itself. This argument is warranted by the statute 27 *Hen. 8*, which directs that

(a) 6 T. R. 198.

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bailiffs of liberties shall “make due execution of all *process* to them to be directed for ministration of justice within such liberties.” Now this must mean process directed to them in furtherance of some proceeding or other, issued by the justices in quarter sessions, or justices of general gaol delivery, and not process issued by the sheriff; whereas here, the process which the defendant was called upon to execute, was summoning jurors by virtue of a warrant from the sheriff, so that it was not process issuing from the *Court*. The fair intendment of the statute is, that the bailiff of the liberty is to execute process issuing from the persons previously mentioned, and not from the sheriff. [*Abbott*, C.J. The quarter sessions issue the process to the sheriff, and the sheriff directs his precept to the bailiff]. That does not appear upon the face of the order. [*Bayley*, J. In what situation would a court of quarter sessions be, if neither the sheriff, nor the bailiff of the franchise, returned any body to serve the office of juror?] If it is the duty of the sheriff to return jurors, and he neglects to do so, the Court may fine him. [*Coltman* referred the Court to 2 *Hawk. P. C.*, c. 8, s. 50, where it is said, “that any two justices, whereof one is of the quorum, may direct their precept under their teste to the sheriff, for the summons on the sessions of the peace, thereby commanding him to return a grand jury before them, or their fellow justices, at a certain day and place, and to give notice to all stewards, constables, and bailiffs of liberties, to be present and do their duties at such day and place, and to proclaim, in proper places throughout his bailiwick, that such sessions will be holden at such day and place, and to attend there himself to his duty,” &c. *Lamb. C.* 4, c. 20]. This passage from *Hawkins* clearly does not shew that the process goes from the sheriff to the bailiff. It only shews that it is the duty of the sheriff merely to give notice to the bailiffs of liberties to be *present*, and to do their duties at such day and place. In the very same work, B. 2, c. 27, s. 17, tit. “of Process,” is this passage:—“In what

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manner such process is to be executed. It is laid down as a general rule, that wherever the king is a party to the suit (as he certainly is to all informations and indictments), the process ought to be executed by the sheriff himself, and not by the bailiff of any franchise, whether it have the *claus enon intromittat*, &c., or not, and whether the defendant be within a franchise, or in the county at large, for the king's prerogative shall be preferred to any franchise." It is not denied in the present case, that the sheriff is at liberty to go into this lordship to execute civil process, provided there is any default in the lord, but he would not have a right to do so without a special writ of *non omittas*, and this shews that the clause of *non omittas*, in the letters patent, refers solely to *civil* process. In all causes to which the king is a party, and in which the rights of the crown are concerned, the sheriff not only may, but he is bound to execute the process by himself, or his proper officer. There is this difference between a sheriff's officer and the bailiff of the lord of *Holderness*, that the latter is the particular servant of the lord, and has no appointment whatever from the sheriff. In some cases the bailiff unites in himself the two characters of officer to the sheriff, and bailiff to the lord, but that is not so here; he is merely the paid particular servant of the seignior. [*Bayley*, J. Then if that be so, we may enforce the personal attendance of the lord of *Holderness* himself]. That might be the result if he is bound to execute this description of process, but here it is clear, that the lord's servant is not bound to obey the precept of the sheriff. The latter has duties cast upon him by law, and he has no right to throw the onus upon the shoulders of a person over whom he has no control. In *Com. Dig. tit. Retorn. D. 3*, it is laid down, that upon a writ of inquiry directed to a sheriff, he cannot say *mandavi ballivo*, &c., for he is to execute it at any place within his county; nor upon process at the suit of the king, nor upon a *distringas juratore* (a). That is a strong

(a) Year B. 19 Hen. 6, 67 a.

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authority to shew that the sheriff had no right to impose this burden on the defendant. Here is no contempt of Court, for no process was directed to the defendant which he was bound to obey. By the act of parliament and the letters patent, the execution of the civil process devolves upon the lord or bailiff, but all criminal process is to be executed by the sheriff or his own officers. But it remains to be considered whether the sessions had jurisdiction to impose a *fine* upon the defendant. It is submitted, that even if they had a right to take cognizance of this disputed question between the sheriff and the lord of the franchise, still it should only have been an amerciamment, and not a fine. The sessions should have entered into a previous inquiry upon the subject, and should have *affeered* (assessed) the defendant. In *Griesley's* case (a) it is said, that an amerciamment and an affeering, is not equivalent to a fine. In *Com. Dig. tit. Justices of Peace, D. 7*, it is said, "If coroners, constables, &c., do not appear at the sessions, the justices may amerce them." In *Hall v. Turbett* (b), where a fine was imposed by the steward of a court leet, for not coming to court, and doing suit, the Court held the fine to be illegal; for it ought not to be without *presentment*, that he ought to do suit at court, and he shall rather be amerced than fined; *Anderson, C. J.*, added, "of offences within the cognizance of the steward as judge, he may assess a fine, but *not of others*, except they be *presented*; for non constat to the steward, whether he were resident within the leet or not, or what cause he had for his absence." In the present case the offence, if any were attributable to the defendant, was not cognizable by the sessions; the defendant was guilty of no contempt of Court. All he could be deemed guilty of was, in disobeying the precept of the sheriff, to whom he was not accountable. At all events, he ought not to have been fined without a presentment, so that the matter might come under the judicial notice of the Court.

(a) Cro. Eliz. 241.

(b) 8 Rep. 40.

ABBOTT, C. J.—This case comes before the Court upon a motion to quash the order of sessions. The affidavits on which the rule nisi was obtained, are now before us, and it appears from them, that the object of this proceeding has been really to try the question, whether the bailiff of this liberty was bound to take upon himself the burden of summoning jurors within his bailiwick to attend the sessions, or whether it ought to fall upon the sheriff of the county. The object being to try that question, that alone might be a sufficient reason why the Court ought not to enter into any very nice consideration of matters of form; but even if we were to go into the form of the order, I do not see any reasonable objection to it, for agreeably to the principle laid down, as to orders of this Court, every thing is to be presumed to have been rightly done, and all is to be considered as well done, unless the contrary is shewn. We are not to construe an order of this description with the like astuteness that we should an indictment, or other pleading of that nature. Now it is said, that it does not appear on the face of the order, that the defendant was summoned or heard; but if it was his duty to be present at the sessions, (and that it was, seems hardly to be denied in the argument), a summons would be wholly unnecessary. Looking at the affidavits, we find that he purposely absented himself, but his attorney was present and heard, and after making the objection on his behalf, the Court decided against him. Another objection to the form of the order is, that it does not thereby appear that the defendant was duly required to summon the jurors; but inasmuch as it says, that he had been duly required so to do by warrant from the sheriff of *Yorkshire*, dated so and so, I think we must intend in support of the order, that at a reasonable time before the holding of the sessions, the sheriff had transmitted to him his warrant, which, as the order states, he not only neglected, but refused to obey, and this intentment is the more justifiable, as it appears from the affida-

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vits, that this proceeding was adopted solely for the purpose of trying the real question between the parties. That question is, whether the bailiff of an ancient liberty is bound to summon jurors residing within his liberty, or whether that duty is imposed by law upon the sheriff of the county. Now according to the passage cited from 2 *Hawk. P. C.*, c. 8, s. 50, the justices are to direct their precepts under their teste, to the sheriff, for the summons of the sessions of the peace, thereby commanding him to return a grand jury before them at a certain day and place, and to give notice to all stewards, constables, and bailiffs of liberties, to be present, and to do their duties, &c. From other affidavits it appears to have been the usage for the bailiffs of other liberties within the *East and North Ridings*, to attend at the quarter sessions, and that the constant course of practice has been for the sheriff to send his precept to the bailiffs of those franchises to summon jurors residing within their respective bailiwicks, and to attend themselves at the sessions during its sitting. Adverting therefore to this long established usage, and fortified by the authority of *Hawkins' Pleas of the Crown*, we think we ought not to interpose to quash this order.

BAYLEY, J.—I think that upon the true construction of this charter, as connected with the statute 27 *Hen. 8*, there is an obligation on the bailiff of *Holderness* to execute process of this nature within his liberty. The charter of *Car. 2*, gives the execution of “all and singular writs, processes, mandates, warrants, and precepts of his said majesty, his heirs and successors, by the proper bailiffs, officers, and ministers of the said *John Viscount Dunbar*, his heirs and assigns, from time to time, there to be done and executed;” and then it imposes a restriction upon the sheriff, “so that no sheriff of his majesty, his heirs or successors, should enter into the liberty, to do or

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execute any thing belonging to his office, unless it touched his said majesty or his crown, and unless upon the default of the bailiffs and officers of the said Viscount *Dunbar*, &c." The statute 27 *Hen.* 8, is applicable to "all bailiffs of any liberties, or franchises, who *in times past* have used or ought to attend upon the justices of assize, justices of gaol delivery, and justices of the peace at large in any county, and shall be attendant to the justices, &c." First, then there is by the charter, a general power given to the lord of the franchise, to execute process within the liberty by his bailiff; and then, secondly, the statute recognizes the liability of bailiffs of liberties, who by ancient usage had been accustomed to do certain duties before that act. I agree that this statute applies to those officers only who in times past had been used to attend upon the justices; and I also agree that the privilege granted by the charter could not be created *de novo*; but it appears from the recital of the charter, long and long before the statute, that this had been an ancient liberty, and that from the earliest times to the present, the practice has been for the bailiff to execute processes within the liberty. The passage cited from *Hawkins* shews that the usual practice is for the sheriff to command the bailiff to execute the process within his bailiwick; and I know in point of practice, that the usage in the county of *York*, is for the bailiffs of liberties to return jurors from their districts, to serve at the assizes, by virtue of a precept directed to them by the sheriff. In case of any neglect of duty, the Court has the power in its option of acting either against the sheriff or the bailiff. Both may be amenable, but if the Court in its discretion thinks the bailiff the person on whom the punishment should attach, the Court is at liberty to punish him if it thinks proper. I am of opinion that the same authority may be exercised by the Court of quarter sessions. I do not enter upon the question of form, the object of these parties being fairly to try the question upon the



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merits; and for these reasons I am of opinion that the rule for quashing the order of sessions must be discharged.


LITLEDALÉ, J. (a) concurred.

Rule discharged.

(a) *Holroyd, J.*, was in the Bail Court.

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 November 16.


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 In order to gain a settlement under 35 Geo. 3, c. 101, by paying rates, it is not necessary that the party should be rated at 10*l.* in the assessment; it is sufficient if the tenement be in fact of the value of 10*l.*, though it be rated at a less amount. Landlord's fixtures, which are parcel of the freehold, may be taken into the valuation of a 10*l.* tenement, though without them the tenement would not be of sufficient value to gain a settlement.


BY an order of two justices, for the city and county of the city of *Canterbury*, *Mary Wilson*, widow, and her six children, were removed from *Saint Mary, Northgate*, in the said city and county, to *Saint Dunstan's*, in the county of *Kent*. On appeal, the sessions confirmed the order, (except as to the two elder children, as to whom the order was abandoned), subject to the opinion of this Court on the following case:—

On the part of the respondent parish it was proved, that the pauper's husband had on the 23d of *April*, 1823, gone to live in a house in the parish of *St. Dunstan*, at the yearly rent of 10*l.*; that he had not occupied it for a year, but that he had been rated for the house in that parish, and had paid the assessment for one quarter; that one *Butler* had occupied the house before the pauper's husband; that at the time of the hearing of the appeal, one *Hunt* held it, each of them paying the annual rent of 10*l.*; and that it had for six years preceding the pauper's tenancy been let, together with the articles of furniture hereinafter mentioned, at 10*l.* per annum. On the part of the appellant parish it was proved, that all houses in the parish of *St. Dunstan* were rated at half their actual value, and that in the assessment on the pauper's husband, the said house was valued at 3*l.* 10*s.*; that at the time of his occupation the house was in a very bad state of repair,

and that it would have required an expenditure of 40*l.* to put it into tenantable condition; that since his death, and previously to *Hunt's* tenancy, 12*l.* had been expended upon it; that there were a stove and cupboard in a room below stairs, a grate and a cupboard in the chamber, and a grate in the kitchen; that the stove and grates had not originally belonged to the house, but had been put in by a tenant, and the landlord had taken them in part payment of rent about six years before; that these were fixed with brick-work in the chimney places, but that they might be removed without doing any injury to the chimney places; that the cupboards stood on the ground and were supported by holdfasts, and that these might also be removed without doing any other injury to the walls than leaving a few marks of nails; that the use of these several articles was worth about 6*d.* per week; and that the tenement including the use of them, was worth 7*l.* 10*s.*, and without them about 6*l.* per annum. The court of quarter sessions confirmed the order, but stated their opinion to be, that if any deduction, however small in amount, was to be made in respect of the above-mentioned articles, the tenement would not be of the annual value of 10*l.*

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*Berens* and *Starr* in support of the order of sessions. This case is stated for the purpose of determining whether the fixtures, which clearly belonged to the landlord, and were demised with the house, are to be taken into consideration in estimating the annual value of the tenement, in respect of which it is contended, the pauper's husband gained a settlement under 35 Geo. 3, c. 101, by being-rated and paying his share towards the public taxes and levies of the parish. It is submitted, that if these are such fixtures as would go to the heir as part of the freehold, they must be taken into account as giving an additional value to the tenement. Now it is quite clear that as they belonged to the landlord, and were demised with the pre-


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mises, they would go to the landlord's heir, and not to his executor. It is laid down, that even if a chattel becomes affixed to the freehold, it goes to the heir and not to the executors; and it has been established in various instances, that where a tenant has fixed articles even of machinery, during the term demised, they become the property of the landlord when the tenancy expires. There is indeed one case in which this rule has been relaxed, *Elwes v. Maw(a)*, where a distinction was made between things annexed to the freehold for the purposes of trade, and those added with a view to the better enjoyment of the premises, as an accessory to the realty. The general rule, however, clearly is, that wherever an addition is made to the freehold, it is to be taken into the valuation of the premises. Upon this principle, a carding machine affixed to a building, the machinery of a malt house, or even a billiard table let into the floor, would be taken into calculation. Such additions would be as much parts of the freehold as glass in the windows of a house. The case of *Winne v. Ingleby(b)*, is an authority in point; for there it was held, that the sheriff could not take in execution ranges, ovens, and set pots affixed to a house built by the person against whom the execution issued. But the case of *Colegrave v. Dias Santos(c)*, is still more conclusive, and indeed goes farther than is necessary to contend in the present case, for there a house being sold by public auction, without any stipulation on the part of the vendor, that the fixtures were to be taken and paid for separately, and the vendee, who had paid the purchase-money, entered into possession under a conveyance, it was held that the fixtures passed to the vendee as part of the house, and were not the subject of trover. So in *Lawton v. Salmon(d)*, it was held, that salt pans, necessary to the use of

(a) 3 East, 38, where all the prior cases upon this subject are collected. See *Williams v. Williams*, 12 East, 209.

(b) Ante, vol. i. 247. 5 B. & A., S. C. (c) Ante, vol. iii. 255. 2 B. & C. 76, S. C. (d) 1 H. Bl., 259 n.

salt works, and without which they would be of no value, are the property of the heir, and not of the executor, though they might be removed without injuring the buildings. On the authority of these cases, the fixtures here must be considered as part of the freehold, and taken into the estimate in valuing the tenement.


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*Marsham* and *Brodrick* contra. This is not a question arising upon the tenement act, 59 Geo. 3, c. 50(a), but whether the pauper's husband gained a settlement under 35 Geo. 3, c. 101, by being charged with and paying his share towards the public taxes or levies of the parish, in respect of a tenement, being of the value of 10*l.* (b). It is clear, that if this was a case depending upon the construction of the tenement act, a settlement would not be gained. The articles in question cannot be considered as forming part of the tenement. It cannot be denied that if they had been placed there by the tenant himself during his occupation, he might have removed them either before or at the time of his quitting the premises; *Beck v. Rebow* (c), and consequently they could not be deemed as part of the freehold. The circumstance of their being the property of the landlord himself can make no difference as respects this question, because they constituted no part of the tenement. It is true that by agreement between the landlord and the tenant, the latter was to pay the former a rent of 10*l.*, but that was for something more than the tenement, namely, for the use of the grates and cupboards in addition. The ancient rule of law as to fixtures, was "quod ad œdibus non facile revellitur," becomes a part of the inheritance, and passes to the heir; *Spelman's Gloss.* 277. According to that rule, these articles being easily pulled away would form no part of the tenement. But this rule has been very much relaxed by the decision of *Elwes v.*

(a) Repealed by 6 Geo. 4, c. 57.

(b) Vide *Rex v. St. Pancras*, ante vol. iii. 343. 2 D. & R. Maj. Cases, 28, S. C. 2 B. & C. 122, S. C.

(c) 1 P. Wms. 94


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*Maw*, and so relaxed, it must prevail here. It by no means follows that because articles of this description are once annexed to the freehold, they are for ever after to be considered as belonging to the landlord, and forming parcel of the house. The cases of *Rex v. Whitechapel*(a), and *Rex v. North Redburn*(b), afford no rule for the decision of the present question, for although in each some articles were demised beyond the mere tenements, yet the sessions did not state the value of such additional articles, nor intimate any opinion, as here, that if any deduction was to be made in respect to those articles, the tenements would not be of the annual value of 10*l*. Supposing those articles to have been the property of the tenant, and therefore removable, it is quite clear that they could not be estimated in the value of the tenement. But conceding them to form part of the tenement, because they belong to the landlord, and that the tenement was of the annual value of 10*l*., still the question is, whether the pauper's husband could gain a settlement by paying rates, unless he was actually rated by the parish in respect of a tenement of that value. By the old act 3 and 4 *W. and M.*, c. 11, s. 6, a person would gain a settlement by being rated, without any regard to the amount of the rate, or the value of the tenement in respect of which he was rated. The bare rating was considered as an acknowledgment that the party rated was a parishioner; but since the statute 39 *Geo.* 3, c. 101, no person can gain a settlement by being charged with and paying his share towards the public taxes or levies of the parish, in respect of any tenement, "not being of the value of 10*l*." Unless therefore the parish officers rate a person to the amount of 10*l*. a year, they do not acknowledge him to be a parishioner. The rating is the acknowledgment, and it is the acknowledgment which gives the settlement. It is submitted, therefore, that the rate must be the criterion of the value. Here the parish has rated this tenement at 3*l*. 10*s*., being


(a) 5 Bolt. 102.

(b) 4 T. R. 770.

at half the annual value, according to the mode of assessment adopted in *St. Dunstan's*. It is clear then that by rating this person at 3*l.* 10*s.*, the parish considered the annual value of the tenement to be no more than 7*l.* In *Rex v. White*(a), it was held that furniture was not rateable, and that for a very good reason, because he who has to make the rate cannot get into the house to ascertain what the value of the furniture is. For the same reason fixtures are not rateable. If, therefore, with a view to a settlement, the furniture or fixtures could be taken into the valuation of the tenement, the effect would be, that whilst the parish is burthened thereby, it is not at the same time enriched by bringing such property within the operation of the rate. These fixtures are estimated as being worth 1*l.* 10*s.* per annum, but it is clear that the parish could not have rated them as part of the tenement. The assessment in the parish books is the best test of the annual value of the tenement on all occasions, and in the absence of all fraud, the rate book must be resorted to as the most satisfactory and conclusive mode of ascertaining the value. If the actual rent paid by the tenant is to be taken as the test, there would be this difficulty imposed upon the parish officers, that it is impossible for them to ascertain what the amount of rent is, which is always a matter of private bargain between the landlord and tenant, who have an interest in keeping the parish in the dark upon the subject, in order that it may be rated as low as possible. With a view to the rate, the parish officers are the most competent and certainly the most disinterested assessors of the value, and nothing can be more reasonable, than that they should have the power of determining whom they will acknowledge as parishioners. If the actual rent is to be the criterion of value, then the parish would in many cases be burthened where the tenement was far short of the value of 10*l.* The safest course is to act upon the parish assessment, and according to that rule, it is mani-

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fest that this pauper's husband gained no settlement by paying rates.

ABBOTT, C. J.—It is found as a fact in the case, that these grates and cupboards were the property of the landlord, and affixed to the freehold, the former by brick-work, and the latter by hold-fasts. Being so affixed, I am of opinion that they were parcel of the tenement demised to the pauper's husband. Whatever might be the question, if they were merely tenant's fixtures, it is unnecessary to discuss in the present case. The sessions in confirming the order have stated their opinion to be, that if any deduction however small in amount, is to be made in respect of these articles, the tenement would not be of the annual value of 10*l.*; from whence I infer, that in their judgment no deduction ought to be made. It is contended against the order that upon the true construction of the stat. 35 Geo. 3, c. 101, we ought to hold that no person shall gain a settlement by being charged and paying rates, in respect of a tenement of the yearly value of 10*l.* unless he is actually rated at that sum in the assessment. Whether that was the intention of the legislature may admit of some doubt, but certainly it is not for us to say that such an effect is to be given to the act of parliament, because the expressions used in the statute are, “that no person shall gain a settlement by being charged with and paying his share towards the public taxes of the parish, in respect of any tenement, *not being of the value of 10*l.**” Then must not the yearly value be the criterion, and not the sum at which the tenant is actually rated? In this case, I think that the fixtures having made the tenement amount to the value of 10*l.*, we must say that the pauper's husband gained a settlement, without any regard to the amount of rate, or the value fixed by the parish officers in their assessment. If we were to lay down a different rule of construction, it might happen that a person could gain no settlement by rating, even though it could be proved to

demonstration, that the tenement was of the yearly value of 20*l.* or any larger amount. For these reasons I am of opinion that the sessions were right.

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BAYLEY, J.—I am of the same opinion. These articles being affixed to the freehold, and being part of the demised premises, I think they might enter into the valuation of the tenement. I do not agree with the construction put upon the 35 *Geo.* 3, c. 101, in argument. The legislature has said, “not being of the value of 10*l.*,” which only shews that the tenement must be of that value. If it had said “not being *rated at* the value of 10*l.*,” I should have acceded to the argument.

LITLEDALE, J.(a). I am also of opinion that these articles must be considered as parcel of the freehold. If the landlord had died, they would have gone to the heir and not to the executor. Then as the annual value of the tenement is increased by the addition of these fixtures, I think they must be taken into account with a view to the settlement. In *Winne v. Ingleby*, and *Colegrave v. Dias Santos*, some articles, savouring less of the realty than these, were held to be fixtures, and parcel of the freehold. I agree with my Lord Chief Justice and my brother *Bayley* in their construction of the statute.

Order of Sessions confirmed.


(a) *Holroyd, J.*, was in the Bail Court.

WINDLER v. FEARON.

Thursday,  
Nov. 17th.

THIS was an action of covenant on a deed of exchange. The indorsement on a deed of exchange, of the names of the executing parties, and the date, &c., is no part of the instrument itself, and therefore not to be taken into calculation with a view to the progressive stamp duty imposed by 55 *Geo.* 3, c. 184, sch. pt. 1, tit. *Exchange*.



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at the last assizes for the county of *Cumberland*, it was objected, that the deed in question was not sufficiently stamped in pursuance of the stamp act, 55 *Geo. 3*, c. 184, schedule part 1, tit. *Exchange*, by which, "if a sum of 300*l.* or upwards, shall be paid, or agreed to be paid for equality of exchange," the stamp is to be 1*l.* 15*s.*; "and where any such deed of exchange, together with any schedule, receipt, or other matter, put or *endorsed thereon*, or annexed thereto, shall contain 2160 words, or upwards, then for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of 1*l.* 5*s.*" The deed had two stamps, one for 1*l.* 15*s.*, and the other for 1*l.* 5*s.*, which would have been sufficient, inasmuch as the body of it contained only 3230 words; but it appearing that the indorsement, containing the names of the parties, the date, &c., would make the words exceed 3240, it was contended, that an additional stamp of 1*l.* 5*s.* was requisite. The learned judge was, however, of opinion, that the indorsement was no part of the deed, and the plaintiff had a verdict, but leave was given to move to enter a nonsuit.

*Brougham* now moved accordingly, and contended, that the indorsement was part of the deed. In *Jevens v. Harridge* (a) it is said, on the authority of *Cook v. Remington* (b), that there is a distinction between the condition or indorsement on a *deed*, and that on a *bond*, in this respect, that the indorsement on a deed made at the time of its being executed, is part of the deed, and therefore there can be no complete oyer of the deed without the indorsement. So here, if oyer had been craved of this deed, the indorsement must have been set out.

ABBOTT, C. J.—I am of opinion that there is nothing in this objection. The indorsement is not the operative part of the deed.

(a) 1 *Wms. Saunders*, 9 *b.*

(b) 6 *Mod.* 237.

BAYLEY, J.—The indorsement here does not control the operation of the deed. The indorsement is merely evidence of the time it was executed.

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LITLEDALE, J. (a)—You might as well say that an envelope, on which the names of the parties and date were written, was a part of the deed, and therefore required an additional stamp. The indorsement is no part of the deed itself. It is not material to the construction of the deed. The indorsement alluded to in the schedule to the stamp act, means an indorsement which is to control the operation of the instrument.

Rule refused.


(a) *Holroyd, J.*, was in the Bail Court.

T. MORROW v. BELCHER and others.

Friday,  
Nov. 18th.

**DECLARATION** in trespass against *Thomas Belcher, Caroline Watson, and Thomas Foster*, for an assault and false imprisonment. Pleas; first, by all the defendants, not guilty, and issue thereon. Second, by *Belcher*, a justification, in defence of the possession of his house. Third, by *Fowler*, as servant of *Belcher*, the like justification. Replication to the second plea, that *Belcher* committed the trespasses with more force than was necessary for the purpose in that plea mentioned. Replication to the third plea, that *Foster* committed the trespasses with more force than was necessary for the purpose in that plea mentioned. Rejoinder by all the defendants, to the replications to the second plea, that all the defendants were not guilty of committing the trespass with more force than was necessary. Similar rejoinder to the replication to the third plea. Demurrer to the above rejoinders, assigning for cause, that as *Belcher* and *Foster* pleaded separately in the second and third pleas, and the plaintiff replied that they separately were guilty of more force than was necessary,

Declaration in trespass against three. Plea by all, not guilty. Separate pleas of justification by two. Replication to these pleas that those two defendants were guilty of excess. Rejoinder by all three defendants, that they were not all three guilty of excess. On demurrer, the rejoinders held ill, and judgment for plaintiff.

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the rejoinder by *all* the defendants, that *all* the defendants were not guilty of committing such excess, is bad in law. Joinder in demurrer.

*Chitty*, in support of the demurrer, was stopped by the Court (a).

*E. Lawes*, *contrà*. The declaration in this case is for a *joint* trespass by all the defendants. Two of the plaintiffs plead separately to the joint complaint. The plaintiff replies a new cause of action; namely, a separate trespass by each of those defendants, and he complains of excess, which formed no part of his original alleged ground of action; there is, therefore, a plain discontinuance. [*Bayley*, J. In his replication he only gives a *character* to the trespass.] In *Tippet v. May and others* (b), the plaintiff declared in assumpsit against three; two pleaded a debt of record by way of set-off; the plaintiff replied nul tiel record, and gave a day to the two defendants, but entered no suggestion respecting the third; and it was held on demurrer, that the action being discontinued, judgment must be given against the plaintiff, even though the defendant's plea were bad. [*Bayley*, J. But you have this absurdity here, that the defendant, *Watson*, does not join in the special pleas, but she does in the rejoinder.] What is said by all is said by each; but at all events this would only be an irregularity, and cannot be taken advantage on demurrer. *Bartholomew v. Ireland* (c).


ABBOTT, C. J.—There might be some ground for the argument now urged, if this were an action of assumpsit, because the plaintiff could not recover, unless he recovered against all the defendants; but this being an action of tres-

(a) See *Holland and Drake's case*, 2 Leon. 199. Com. Dig. tit. *Pleader*, F. 11. Tidd, 927, 8th ed.

(b) 1 B. & P. 411.

(c) 1 Wils. 219. *Andrews*, 188, S. C. See *Shiffin's case*, Comb. 310.

pass against several, he may succeed against one, but not against the others. Suppose *Belcher* alone had pleaded, the plaintiff would have been at liberty to sign judgment against the other defendants, because that would have been an acknowledgment that they were guilty of the trespass. Would it not then have been absurd for them all to have joined afterwards in the rejoinder? Trying the case by that test, it is clear that these rejoinders are insensible, and cannot be supported.

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BAYLEY, J.—Two of these defendants have pleaded separately a special plea respectively, but the other has pleaded no special plea. The plaintiff complains of a joint and several trespass committed by the three defendants. One of the defendants says, “I have no justifiable reason for committing the trespass, but I deny the fact.” The others also deny the fact, but they respectively plead a justification. The plaintiff replies, that those two defendants were respectively guilty of excess, for they had used more force than was necessary to expel him from the house. The defendants reply, that they were not *all* guilty of excess. Now they were not all charged with excess, and therefore their rejoinders do not pursue the pleas originally pleaded, and are consequently demurrable.

HOLROYD, J.—I think the rejoinders are bad, and afford no answer to the replications, because they do not pursue the pleas. It is a general rule in pleading, that the rejoinder must pursue the plea; but here is a departure.

LITLEDALE, J.—I am of the same opinion. It is a fundamental rule, that the rejoinder should pursue the plea, for otherwise a different kind of issue might be introduced. One of these defendants pleads no special plea whatever. The other two plead distinct special pleas; and then they all come together again in the rejoinder, which is an informal and bad mode of rejoining. But the

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defendant, *Watson*, had no right to rejoin, after having originally pleaded no more than the general issue.

Judgment for the plaintiff.

Friday,  
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DOE on the several demises of JOSEPH FOSTER, MARY FOSTER, and BETTY WOOD v. SCOTT.

There can be no general occupancy of copyhold property, nor a special occupancy, but by custom, or by the designation of a special occupant in the lord's grant. Therefore, where a copyhold estate was granted to *A.* for her own life and the life of *B.*, with a grant of the reversion to *C.* for other lives, and *A.* devised the estate to *B.*, who kept possession for more than twenty years:—Held, that *C.*'s right of possession attached on the death of *A.*, and as no claim had been made within twenty years, an ejectment for the premises was barred by the Statute of Limitations.


THIS was an ejectment for certain lands and tenements, situate in the parish of *North Curry*, in the county of *Somerset*. At the trial before *Hullock*, B., at the *Somersetshire* Lent assizes, 1823, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:—

The lessor of the plaintiff, *Mary Foster*, widow, formerly *Mary Coggan*, claimed the estate in question, as the daughter of *Anthony Coggan*, deceased, and produced at the trial the following copy of court roll:—"Manor of *Knapfee*. The court baron of the worshipful the dean and chapter of the cathedral church of *Wells*, lord of the said manor, held at *North Curry* the 16th of October, 1770, in the time of the reverend *John Payne*, clerk, master of arts, one of the canons residentiary of the same cathedral church being steward. To this court came *Anthony Coggan*, and took of the said lords the reversion of three acres more or less of arable land, in *Burrough Field*, of overland with the appurtenances within the said manor, late in the possession of *Mary* wife of *Thomas Exon*, deceased, to have and to hold the said reversion and premises with the appurtenances unto *Mary*, now aged about twenty years, *Betty*, now aged about fourteen years, and *Richard*, now aged about 21 years, son and daughters of the said *Anthony Coggan*, for the term of their lives and the life of every and either of them longest liver successively, according to the custom of the said manor, immediately

after the death, surrender, forfeiture, or other sooner determination of the estate of *Penelope Culverwell*, for her own life and the life of *Thomas Exon*, of and in the said premises, under the clear yearly rent of 5s. 1d.; and also doing and performing their work towards digging and cleansing the said lord's rivers, according to the rates of the said premises, when and as often as need shall require; and under all other burdens, works, heriots, suits, services, and customs, therefore formerly due and of right accustomed; and for such an estate in reversion so to be had in the said premises as aforesaid, the said *Penelope Culverwell* gave to the said lords a fine of 4l. 14s. 6d., beforehand paid, and so forth." The lessor of the plaintiff also proved, that *Penelope Culverwell* died on the 25th of June, 1779, and *Thomas Exon* died in September, 1821. On the part of the defendant the following copies of court roll were produced:—"The court baron of the worshipful the dean and chapter of the cathedral church of *Wells*, lord of the said manor there held on *Monday*, the 17th day of *August*, 1752, and in the time of the reverend *John Walter*, clerk, master of arts, one of the canons residentiary of the said cathedral church, being steward. To this court came *Penelope Culverwell*, and of her own purchase hath taken from the said lords the reversion of three acres, more or less, of arable land in *Burrough Field*, of overland, with the appurtenances within the manor aforesaid, now in the possession of *Mary Exon*, wife of *Thomas Exon*, for the term of her life; to have and to hold the said reversion and premises with the appurtenances unto the said *Penelope Culverwell*, for the lives of herself and *Thomas Exon*, son of *Thomas Exon*, and for and during the life of every and either of them longest living successively, according to the custom of the manor. The reversion when it shall happen to commence immediately after the death, surrender, forfeiture, or other sooner determination of the estate of the said *Mary Exon*, of and in the said premises, under the yearly rent of 5s. 1d., and for an

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heriot 10s. when it shall happen. And also doing and performing their work towards digging, &c. And for such an estate in reversion so to be had in the premises aforesaid, the said *Penelope Culverwell* gave to the said lord 5*l.* for a fine, made this year and paid beforehand; and so the said *Penelope Culverwell*, and *Thomas Exon* the son, are admitted tenants in reversion, but their fealty is respited, and so forth. The following surrender appeared on the rolls:—

“Manor of *Knapfee*, 4th June, 1782. Homage; Mr. *John Powell*, and *John Gridley*, sworn to testify the truth of the under-written surrender.

“To this court came the reverend *Thomas Exon*, devisee and sole executor of the last will and testament of *Penelope Culverwell*, and surrendered into the hands of the said lords, three acres more or less, of arable land in *Burrough Field*, of over-land, with the appurtenances within the said manor, which he claims to hold by two several copies of court roll of the said manor, one bearing date the 17th day of *August*, 1752, and the other the 10th day of *October*, 1770, for the lives of himself and *Mary Coggan*, now *Foster*, *Betty Coggan* now *Betty Wood*, and *Richard Coggan* children of *Anthony Coggan*, and the life of the longest liver of them, and all the estate, right, title, interest, property, possession, reversion, claim and demand whatsoever, both at law and in equity, of him the said *Thomas Exon*, of, in, and to the said premises and every part thereof, together with the two several recited copies of court roll, to be cancelled; to the intent that the said lords may do therewith their will and pleasure.”

“To a court baron then held came *Robert Scott*, and of his own purchase took of the said lord three acres, more or less, of arable land, &c. with the appurtenances within the said manor, formerly in the possession of *Mary* the wife of *Thomas Exon*, deceased, late of *Penelope Culverwell*, also deceased, but then in the lord's hands, by virtue of a

surrender that day made, to have and to hold the said premises, with the appurtenances, unto the said *Thomas Eron*, clerk, for the term of his life, according to the custom of the said manor, under the yearly rent of 5s. 1d., and also doing, &c.; and for such estate so to be had in the said premises as aforesaid, the said *Robert Scott* gave to the said lord for a fine, a competent sum of money; and so the said *Robert Scott* is admitted tenant, and hath done his fealty, and so forth."

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"To the same court baron came *Robert Scott*, and of his own purchase took of the said lords the reversion of three acres, more or less, of arable land, &c., with the appurtenances within the said manor, formerly in the possession of *Mary*, wife of *Thomas Eron*, deceased, and late of *Penelope Culverwell*, also deceased, but then of *Robert Scott*, to have and to hold the said reversion and premises, with the appurtenances, unto *Mary Scott*, then aged about 22 years, *Sarah Scott*, then aged about eighteen years, and *Avis Scott*, then aged about sixteen years, heirs of the said *Robert Scott*, for the term of their lives, and the life of every of them longest living, successively, according to the custom of the said manor, immediately after the death, surrender, forfeiture, or other sooner determination of an estate then subsisting in the premises for the life of the reverend *Thomas Eron*, under the clear yearly rent of 5s. 1d., and also doing, &c.; and for such an estate in reversion so to be had in the said premises as aforesaid, the said *Robert Scott* gave to the lords for a fine, a competent sum of money; and so the said *Mary Scott*, *Sarah Scott*, and *Avis Scott*, were admitted tenants in reversion, &c."

The defendant was the devisee and sole executor of *Robert Scott*, deceased. In the manor of *Knapfee* the grant is usually made to the person paying the fine, and not to have the grant made to himself in his own name but to some other person. No instance is known within twenty years, in the time of the present steward, of any person paying a




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fine on a grant, and not taking the grant in his own name, and not having any interest in his behalf stated in the habendum, who has ever exercised the right of passing his beneficial or equitable interest by surrender; but the steward said he believed it to be the reputed custom that such persons might surrender such beneficial or equitable interest.

The questions for the opinion of the Court are, first, whether the lessor of the plaintiff is entitled to any estate and interest in the premises in question, under the said grant of 1770; and, if so, whether the surrender of her life by *Thomas Eron*, the devisee of *Penelope Culverwell*, did not divest the said *Mary Foster* of all her estate and interest; and, second, whether inasmuch as the legal estate, if any, of *Mary Foster* accrued on the death of *Penelope Culverwell*, more than 40 years ago, during which period there has been an adverse possession, the plaintiff is not barred from maintaining ejectment?

C. F. Williams, for the lessor of the plaintiff. First, it is submitted, that the legal interest in the premises in question vested in the lessor of the plaintiff on the death of *Thomas Eron*, by virtue of the grant of 1770. It is clear, that during the subsistence of the estate of *Penelope Culverwell* and *T. Eron*, the reversion was in the *Coggans*, unless something had been done by *Culverwell* or *Eron* to defeat that reversion. Admitting that *Thomas Eron*, as devisee of *Penelope Culverwell*, had a right to hold for his life, still as *Penelope Culverwell* herself had only an equitable interest, whilst the *Coggans* had the reversion, she could devise no greater interest than she herself possessed, and as *Eron* could be in no better situation than his divisor, he clearly had no more than an equitable interest in the lives of the three *Coggans*. The other side, therefore, will be driven to contend, that the reversionary legal interest of the *Coggans* was defeated by something done by *Penelope Culverwell* or *Thomas Eron*. Now upon the

case as stated there is nothing to shew that *Penelope* did any thing to defeat the legal interest of the *Coggans*; and with respect to *Eron*, who came into possession on the death of *Penelope*, he could have no authority to surrender an equitable estate. He had nothing upon which the surrender could operate, for at that time the legal interest was in the *Coggans*. The grant of 1770 is to *Anthony Coggan* the father, to have and to hold to A., B., and C., or the longest liver of them. As, therefore, *Eron* had nothing more than an equitable estate, the surrender by him was wholly nugatory. It is laid down as clear law in *Mr. Watkins' Treatise on Copyholds*, 58, that nothing can be surrendered but a *legal* interest. On this part of the argument, therefore, it is sufficient to contend, that as the legal estate was in the *Coggans*, the surrender by *Mr. Eron* of his equitable interest was inoperative for the purpose of defeating the title of the *Coggans*. Assuming that custom would control the general rule of law upon this subject, still here is no custom found. At the utmost the steward only says, that he *believed* such a custom existed, but that is not sufficient. Conceding that *Eron* might surrender his equitable interest, still that could not affect the legal estate in the *Coggans*. Secondly, the lessor of the plaintiff is not barred from maintaining ejectment, because her title did not accrue until the death of *Eron* in 1821. It will be argued on the other side, that this ejectment is barred on the fallacious assumption that *Mary Foster's* title accrued on the death of *Penelope Culverwell*, and consequently as more than 40 years had elapsed, during which there has been an adverse possession, this action cannot be supported. Now that is not so, for on the death of *P. Culverwell* in 1779, *Eron*, as devisee under her will, became entitled to the estate for his life. [*Bayley, J.* He was devisee under *Penelope's* will, and upon her death, he became special occupant. The grant of 1752 is to *Penelope*, habendum for her own life and the life of *Thomas Eron*. As soon therefore as she died, *Eron's* was a special

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occupancy]. That would be so in ordinary cases, but as in the absence of *custom*, there can be no surrender of an equitable estate, to the prejudice of the legal estate, it is submitted that the title of the person entitled to the legal interest cannot be barred by such an occupation. No case can be found which will authorize a person who is merely tenant in possession of a life estate, to surrender a legal estate, without an actual surrender by the other parties interested. No special custom is here found to authorize such a proceeding. Nothing has been done to defeat the title of the *Coggans* but *Exon's* surrender; but that having taken place behind the backs of the *Coggans*, it is a mere nullity; and therefore as *Exon* was in until the time of his death in 1821, *Mary Foster's* legal estate then accrued for the first time, and consequently she is not barred from maintaining ejectment.

Selwyn contra. In point of law *Mary Foster* took nothing under the copy of court roll of the 16th October, 1770. The Court is now called upon for the first time to put a construction upon one of those anomalous instruments which sometimes find their way for want of due caution into manorial courts. It will be found that this instrument of 1770 is unlike a common law conveyance, and even dissimilar from the other copies of court roll which are introduced into the case; it is in fact an instrument which is perfectly *sui generis*. One person is designated as the grantee, namely *Anthony Coggan*, but it does not say that it is an estate to him "of his own purchase," nor are those words mentioned in any part of the instrument. The habendum is not to him, but to his three children, and at the conclusion it appears that the fine was paid by *Penelope Culverwell*. The Court will certainly put such a construction on this singular grant, as reason and good sense will dictate in favour of the instrument, and support it if possible. But the question is, whether the Court will apply the maxim "*ut res valeat*," &c., to a case where to

uphold the instrument would be to defeat the equity of the case. It is clear upon the face of the instrument that all the equity is on the side of *Penelope Culverwell* and those who claim under her, inasmuch as she pays the fine for the estate, the language of the copy of court roll being, that "for such an estate in reversion so to be had in the said premises as aforesaid, the said *Penelope Culverwell* gave to the said lords a fine of 4*l.* 14*s.* 6*d.* beforehand paid and so forth." How the names of *Anthony Coggan*, and his three children, got into the instrument, it is impossible to reconcile in any other way, than by supposing that he was the steward of the manor at the time, and so took this opportunity of inserting his own name and the names of his children. It is clear from the case of *Dyer v. Dyer* (a), that the person who pays the fine, is in equity entitled to the estate. [Abbott, C. J. Suppose *Thomas Eron* to have died before *Penelope Culverwell*, if the grant for the lives of the three children of *Anthony Coggan* be void, then upon the death of *Penelope* the estate would have reverted to the lords. Here is an original grant to *Penelope Culverwell* for her own life, and the life of *Eron*. Then in 1770 she purchases another grant for the lives of three other persons. If that grant is void, and if *Eron* had died first, then upon *Penelope's* dying all the estate ever granted by the lords would be gone]. The grant of 1770 is certainly very informal, and the Court may construe it as void for uncertainty; but supposing the lessor of the plaintiff, *Mary Foster*, could take at all in consequence of being named in the grant, it is clear she could take only as trustee for *Penelope Culverwell*. That is not the form, but it is the substance of the grant. Then *Penelope* having devised the estate to *Eron*, the question is, whether it was not competent to him to make a valid surrender of a trust estate, and that depends upon the custom referred to in the case. Arguing this as a *special case*, it must be taken from the steward's statement, that the custom of

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(a) 1 Watkins on Copyholds, 277, 4th ed. by Coventry.

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this manor warranted such a surrender. [Abbott, C. J. I cannot help entertaining a doubt whether all that is said about an equitable interest is not quite beside the question. There may be a custom by which the lord may grant an estate to A., habendum for the life of A., B., and C., which would give an estate to A. for his own life; and then upon his death the other two would be special occupants; but as there is no such thing as a special occupancy of copyhold lands, without custom, such a construction would be inoperative. There may however be a custom by which A. would take the whole legal interest, and then upon his death, his heir or executor would take; or there may be a custom by which A. might devise the estate by his will. This however might depend upon custom; but the case being silent as to any such custom, the question is, whether we are not bound to treat this wholly as a legal estate, without entangling the argument about an equitable estate in copyhold.—Bayley, J. The difficulty here is, that the case is silent as to the custom on both sides; and I am at present to learn, that if you limit an estate to A. for his own life and the life of B., and A. dies, there is any instance in which B. could come in except by special custom]. Certainly not, and that brings the case to the other question stated in the case. Secondly, assuming that the Court is bound to consider the grant of 1770 as passing the legal estate in reversion to the *Coggans*, then the question is when that estate took effect. Clearly it took effect from and immediately after the death of *Penelope Culverwell*, and as there has been an adverse possession ever since, the present ejectment is barred. In order to ascertain the nature of *Penelope Culverwell's* estate, the attention of the Court must be directed to the grant of 1752. By that, the estate is granted to her for the lives of herself and *T. Eron*; and there is no mention whatever of heirs. Then following up the difficulty suggested by the Court, *T. Eron* would be a mere *cestui que vie*, and therefore without a special custom, he could not take.

Here no such special custom is found, and therefore the estate granted to *Penelope* determined on her death, and *Exon* having then come in as a *stranger*, there has been an adverse possession for 40 years, and this ejectment is barred. There can be no general occupancy of copyholds, *Smartle v. Penhallows* (a), *Doe v. Martin* (b), and *Right v. Bawden* (c), establishes that *T. Exon* took nothing under the grant of 1752. Inasmuch, therefore, as the estate of *Penelope Culverwell* determined on her death, it lay on the other side to shew that *Mary Foster* had made her claim within twenty years after the death of *P. Culverwell*; and this not having been done, this ejectment is barred by an adverse possession of more than 40 years.

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C. F. Williams, in reply, reiterated his former argument.

ABBOTT, C. J.—The copy of the court roll of the 16th October, 1770, purports to be a grant to the *Coggans* of the reversion of the estate in question, to take effect immediately after the death, surrender, forfeiture, or other sooner determination of the estate of *Penelope Culverwell*, for her own life and the life of *Thomas Exon*. Before we can say at what time that estate took effect, so as to become an estate in reversion in possession, we must ascertain upon the facts here found, at what time the estate of *P. Culverwell* determined, for if it determined more than twenty years before this party made any claim, then the Statute of Limitations would be a bar at law to this ejectment. In order to see what the nature of her estate was, we must look at the grant of 1752, and there we find that the estate is granted to her to hold “unto the said *P. Culverwell* for the lives of herself and *Thomas Exon*, son of *Thomas Exon*, and for and during the life of every and either of them longest living successively according to the custom of the manor.” Now no custom is here found. By custom that grant might enure to *P. Culverwell*, or to

(a) 2 Lord Raym. 994. 1 Salk. 188, S. C. (b) 2 Sir W. Bl. 1148.

(c) 3 East. 260.

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her devisee; to her heirs, her assigns, or to *Thomas Eron*, who is nominated as the second life. But no custom is found in this respect, and there being no custom we must look to the general rule of law. By the general rule of law there can be no general occupancy of copyholds, nor, according to the cases cited, can there be any special occupancy, except the occupant is designated in the grant. If the grant had been to *P. Culverwell* and *her heirs* and *assigns* for the life of herself and *T. Eron*, the heir or the assignee might have taken by *custom* as a special occupant; but here is no custom found to explain the grant, and there being no custom, it seems to me that according to the general rule of law, we can only consider this as an estate enuring for the life of *Penelope Culverwell*, and on her death for the benefit of the *Coggans*. That being so, then the Statute of Limitations is a bar to the lessor of the plaintiff. Whether this decision will meet the justice of the case, I am not competent to determine, but I am inclined to think it will, because I cannot help being of opinion, that by the grant to the *Coggans*, it was intended that the estate was to enure to *P. Culverwell's* benefit, and that they were to have no control over the property.

BAYLEY, J.—In addition to what my lord says as to the justice of the case, I will make this observation. When we look at the grant of 1752, it appears that *Penelope Culverwell* comes in “of *her own purchase*,” but in the subsequent deed of 1770, the *Coggans* are not described as coming in of their own purchase; on the contrary the fine appears to have been paid by *P. Culverwell*, and in 1782 the estate was surrendered by *T. Eron*. In whose possession was the grant of 1770? Not in the possession of the lessor of the plaintiff, but of *Eron* as devisee and executor of *Penelope Culverwell*. Now if the grant of 1770 had been intended for the benefit of *Anthony Coggan* and his children, I should have expected that he would have had the possession of it; but he had not. These are circum-

stances which operate powerfully on my mind to induce a belief that it was never the intention that the *Coggans* should take any beneficial interest in the property whatever. But it is said they took the *legal* interest. If they did, it seems to me to be quite clear, that there being no special occupant designated by the grant of 1752, the interest created by that grant ceased when *Penelope Culverwell* died. From that period the right of the lessor of the plaintiff, if ever she had any, attached; and twenty years having elapsed before the commencement of this suit, her right is barred by the Statute of Limitations.

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HOLROYD, J., concurred (a).

Postea to the defendants.

(a) *Littledale, J.*, was gone to Chambers.


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THIS was an action of assumpsit for work and labour, money lent, and upon an account stated with the bankrupts before bankruptcy, and for-money had and received, and upon an account stated with the plaintiffs since the bankruptcy. Plea, non assumpsit, and issue thereon. At Where the agents for the grantor and grantee of an annuity rendered an account to the latter, in which they gave him credit for instalments due from the former, stating at the same time that the money had not been then received, and allowed the grantee to draw upon them for the amount; and the agents having in about twelve months afterwards become bankrupt, and neglected to apprise the grantee in the interval that the instalments still remained unpaid by the grantor, who had become insolvent:—Held, that the money so advanced to the grantee was not recoverable back by the assignees of the agents.

So where the same agents had a bill account with the grantor of several annuities, for the payment of which A. became surety, and in consequence of a letter written by an attorney in the names of the grantees, at the instance of the agents, demanding payment of the arrears of the annuities, from the grantor and his surety, a sum of money was paid under circumstances, from which it was to be collected, that the money was intended to be specifically appropriated to the annuity account, and the agents applied it to the bill account:—Held, that this was a misapplication, and that the money ought to be appropriated pro rata among the annuitants in relief of the surety.

Interest is not payable on money lent, unless by the usage of trade, or from the course of dealing between the parties, a bargain to pay interest can be inferred.

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the trial before *Abbott*, C. J., at the *London* adjourned sittings after *Hilary* term, 1824, a verdict was found for the plaintiffs, damages 8500*l.*, subject to a reference of all matters in difference in the cause to Mr. Justice *Gaselee*, then at the bar, who at the request of either party was to state on the face of his award any point of law which he might think expedient. The reference not having been completed during Mr. Justice *Gaselee*'s continuance at the bar, it was suggested by him, and agreed to by the parties (subject to the approbation of the Court) that he should state the facts in the shape of a special case for the opinion of the Court, which he did as follows:—

The bankrupt *Howard* for many years before, and until the month of *January*, 1814, and the two bankrupts, who then became partners, from thence to the death of the late General Sir *Thomas Picton*, which happened on the 18th *June*, 1815, were employed by the General to purchase annuities for him, and they were in the habit of receiving the annuities, for which they charged him a commission of two and a half per cent., and they in general acted in those and other matters as his bankers. From the death of the General, who made his brother, the defendant, his sole executor and residuary legatee, the bankrupts continued to receive the annuities for the defendant, for which they made the same charge of commission. The act of bankruptcy was committed on the 6th *February*, 1821, and the commission was dated the 21st *August*, in the same year. The bankrupts were in the habit of acting as agents for many other grantees of annuities, and also for some of the grantors, and their usual course was, in their own books, to enter on the credit side of the accounts of the grantees, and on the debit side of the accounts of the respective grantors, the instalments of the annuities, from time to time as they thought fit, but not always at the precise periods when they became payable. There was no new account opened, or even any rest made in the account, on the commencement of the partnership between *Howard* and


Gibbs, or on the death of General *Picton*; but the account was carried on regularly from the commencement in the bankrupt's ledger, with balances from time to time struck as the bankrupts thought proper. The defendant had a pass book, which from time to time as he came to town, was left with the bankrupts to be filled up with the several entries made in the ledger since the period at which it had been last left with them. The pass book was not however a fac simile of the ledger, inasmuch as it did not state the balances made from time to time in the ledger; but in it the balances were struck at the times of making up the pass book. No accounts were settled between them, except by such making up the pass book, and returning it with the balances struck therein as above stated.

In the year 1820, amongst other annuities held by the defendant, were an annuity of 80*l.* for three lives, granted in *February*, 1809, to the late General *Picton*, by *William Rowley*, and secured by an assignment of certain leaseholds to the bankrupt *Howard*, and an annuity of 1075*l.* granted to the defendant by Lord *Alvanley*, and guaranteed by Lord *Foley*, upon their joint personal security.

This action was brought to recover the sum of 2992*l.*, being an alleged balance of monies advanced by the bankrupts to or on the account of the defendant, a part of such balance arising upon the account stated in the pass book, by withdrawing from the credit side thereof several sums of money hereinafter specified, in respect of *Rowley's* and Lord *Alvanley's* annuities, which had been entered, (*without being received*), with certain sums for interest:—In respect of *Rowley's* annuity, 361*l.* 11*s.* 3*d.*, being the excess of the several instalments of that annuity, entered on the credit side of the account, beyond the amount of the leasehold premises, received by *Howard* and *Gibbs* respectively, after deducting the out-goings:—In respect of Lord *Alvanley's* annuity 1075*l.*, the amount of a year's annuity due 6th *December*, 1819, and entered on the credit side of the account under the date of 2d *March*, 1820; and

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268*l.* 15*s.*, the amount of a quarter, due 6th *March*, 1820, entered on the credit side, under date of 8th *June*, 1820:— In respect of interest, 204*l.* interest on a bill for 1000*l.* dated 19th *February*, 1820, drawn by defendant on *Gibbs*, and paid 15th *May*, 1820; and 89*l.* 18*s.* 7½*d.* interest on a bill for 500*l.*, drawn by defendant on *Gibbs*, dated 2d *September*, 1820, and paid 9th *November*, 1820. This interest is calculated to 15th *June*, 1824. The plaintiffs made other claims, but upon an investigation of the account, independently of those sums, the arbitrator found the balance to be 126*l.* 15*s.* 9*d.* in favour of the defendant; and therefore, if the plaintiffs were not entitled to strike out of the defendant's credit, or to recover any of the above sums, or if any, not exceeding the said sum of 126*l.* 15*s.* 9*d.*, the defendant was entitled to the verdict.


With respect to those sums, the facts were these. As to *Rowley's* annuity: By the deed granting that annuity dated 4th *February*, 1809, certain leasehold premises, held by *Rowley*, at rents amounting to 70*l.*, were assigned to the bankrupt *Howard*, (a trustee named by General *Picton*, and who in the transaction was *his* agent only, and not the agent of *Rowley*), in trust for securing the payment of the annuities in case of arrear, by sale or otherwise, and after the death of the persons for whose lives the annuity was granted, and payment of all arrears of the annuity, in trust, as to such part of the premises as should not have been sold, and the residue of the produce of such part as should have been sold, for *Rowley*, his executors, &c., and to be assigned, transferred, and disposed of, as he or they should direct.

In *March*, 1811, *Rowley* became bankrupt, and *Howard* entered into the receipt of the rents of the premises from that time; and he, before the partnership, and he and *Gibbs* since the partnership, continued to receive the rents up to, and even beyond the time of their bankruptcy. The course, however, which they uniformly adopted in keeping their account with the *Pictons*, in their (the bankrupts')

own books, and also in the pass book, was not to enter on the credit side of the account the amount of the rents received, and the outgoings on the debit side, but to enter on the credit side the instalments of the annuity, and on the debit side to enter a charge of two-and-a-half per cent. commission on each instalment. But a distinct account of the rents and out-goings was entered in the bankrupts' books, under the name of *William Rowley*, stating on the credit side the rents received, and on the debit side the out-goings, and the annuity from time to time credited to the *Pictons*. Of this account there was no evidence that the *Pictons* had any notice.

The state of their actual receipts and payments in this last account was as follows:—The receipts during the life of the General were 372*l.*; since his death, 801*l.* The disbursements during his life, including five years' ground rent, were 526*l.*; since his death 332*l.*; so that the receipts in the whole exceeded the disbursements by 315*l.*; and that sum only was applicable to the discharge of the annuity. The instalments entered on the credit side of the account in the General's life-time were 324*l.*, and since his death 352*l.*, making in the whole 676*l.*, leaving an excess of 363*l.* above the sum actually received by the bankrupts.

As to the 1075*l.* and 268*l.* 15*s.* on account of Lord *Alvanley's* annuity, the facts were these:—The 1075*l.* for a year's annuity having become due on the 6th of *December*, 1819, the defendant in *January*, 1820, wrote to the bankrupt *Gibbs*, to inquire whether the arrears had been paid, and stated that he wished to draw for the money. In answer to the letter *Gibbs*, on the 5th *February*, 1820, sent him an account of the several receipts and payments since the pass book had been last made up. In that account, credit was given to the defendant for 1075*l.*, a year's annuity, due from Lord *Alvanley*, 6th *December*, 1819; *Gibbs* at the same time informed the defendant that it had *not* been received, but that when it was, the

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balance in his (defendant's) favour would be 1045*l.* On the 16th of *December*, *Gibbs* wrote to the defendant, and stated that he would honour his draft at 70 days sight, but that he, *Gibbs*, had not received the money. On the 19th of *February* the defendant drew on *Gibbs*, at that date, for 1000*l.* On the 19th or 20th of *May*, the pass book not having been made up since *May* 1819, was left with the bankrupts for that purpose, and the balance was then stated to be 743*l.* 9*s.* 5*d.* in favour of the defendant, which he drew for by a bill, which was afterwards paid on the 30th *June*, 1820. The pass book was soon afterwards returned to the defendant, with an entry, that 1075*l.*, Lord *Alvanley*'s one year's annuity, due 6th *December*, 1819, was not then received. On the debit side of the account, the defendant was charged with the bill of 1000*l.* as paid on the 15th *May*, 1820.

Besides the annuity granted to the defendant, Lord *Alvanley* had granted several others to persons for whom the bankrupts were agents, and Lord *Foley* was surety for them all. The bankrupts had also bill transactions to a considerable amount with Lord *Alvanley*, and on the 24th *October*, 1820, Lord *Alvanley* was indebted to them in a sum of 30,691*l.* on the bill account. On the 31st *October*, 1820, the bankrupts instructed Mr. *Woodriff*, an attorney, to write to Lord *Alvanley* and Lord *Foley*, on behalf of six several annuitants, to whom the arrears then due amounted to about 9000*l.*, (of which 1881*l.* was due to the defendant on the 6th *September*, 1820), and to write as if employed by the annuitants, and not by them, the bankrupts. The attorney accordingly did write to them on two different occasions, and on the 4th or 5th of *November*, was informed by *Gibbs*, that he had received several sums of money from Lord *Alvanley* on account. On the 6th of *November* the attorney had an interview with Lord *Foley* and Lord *Alvanley* together, and pressed them for further sums, Lord *Foley* appeared much hurt at being pressed, being only a surety. Lord *Alvanley* promised to provide

a considerable sum of money, and on the following day he went with *Gibbs* to the chambers of the attorney, and said he was not fully prepared, but threw down bank notes amounting to 2800*l*. The attorney declined to receive the money, saying “ *Gibbs* is the agent of these gentlemen to receive the money.” Lord *Alvanley* then paid the money to *Gibbs*, and promised to pay more in a few days; and the sums actually paid to the bankrupts by Lord *Alvanley* between the 1st and 10th of *November*, amounted to 7146*l*. Between the 27th *October* and 10th *November*, bills to the amount of 9500*l*., accepted by the bankrupts for Lord *Alvanley*, and for which he was to provide, became due. *Gibbs* applied the 7146*l*. paid by Lord *Alvanley* between the 1st and 10th *November* in discharge of the bill account. The bankrupts also between the 30th *October* and 10th *November*, had paid on account of Lord *Alvanley* bills accepted by him to the amount of 10,500*l*., and during the same period he drew bills upon them to the amount of 7000*l*., all of which were afterwards paid. On the 25th *November*, 1820, the bankrupts wrote to Lord *Alvanley*, and inclosed him a statement of an account, by which it appeared that he was indebted to them upwards of 40,000*l*., and they added that that was beside and independent of all his, Lord *Alvanley*’s annuities, due since *December*, 1818. On the same day Lord *Alvanley* by letter acknowledged the account to be correct, and stated that he was aware that the sums so advanced were independent of the arrears of the annuities since *December*, 1818. If the sum of 7146*l*. was not to be considered as appropriated to the annuitants, for whom the attorney wrote, the bankrupts had paid to the defendant more than they had received on his account, and upon that sum they claimed interest from the time when it was advanced.


*M. D. Hill* for the plaintiffs. First, with respect to the two sums of 1075*l*. and 268*l*. 15*s*., paid by *Howard* and *Gibbs*, in respect of Lord *Alvanley*’s annuity, the plaintiffs

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are clearly entitled to recover them back on the ground that they were advanced to the defendant, with notice to him at the times of payment, that they had not been received from the grantor of the annuity. The doctrine applicable to the render of accounts between principal and agent does not arise here (*a*), because at the time the defendant drew for these sums, he had distinct notice that they had not been received from Lord *Alvanley*. They must therefore be treated as advances out of *Howard* and *Gibbs*'s own funds, by way of loan for the defendant's accommodation, and which he is liable to refund in the present action. Upon what principle is it that the defendant seeks to retain these sums of money? It cannot be on the ground of a fraudulent deception practised upon him, for none is surmised. If any fraud existed in the transaction, the arbitrator would have found it as a fact, and not being found by the special case, it cannot be presumed by the Court. The facts found, indeed, negative all idea of fraud, for throughout these transactions the defendant is distinctly informed that the money has not been received from Lord *Alvanley*. No inference of fraud can arise from the charge of commission on the debit side of the account, for that was as much executory as the receipt of the money by *Howard* and *Gibbs* from the grantor of the annuity. If the bankrupts had not received the money, it could not be said that they had put the commission into their pockets. The defendant knew at the time this charge was made, that *Howard* and *Gibbs* had not received the money, and therefore he could not be deceived, nor can he derive any advantage from the fact that such a charge was made in his pass book. If, indeed, at the time this charge was made, the defendant was kept in ignorance of the fact that the money had not been paid, he would have fair ground for presuming that the bank-

(*a*) Vide *Skyring v. Greenwood*, ante, vol. vi. 401. 4 B. & C. 281, S. C. *Lowry v. Bourdieu*, Doug. 467. *Bilbie v. Leamlie*, 2 East, 469. And *Brisbane v. Dacres*, 5 Taunt. 143.

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rants had received the money, and that they were then paying him only what was his own, and charging him the usual commission on the payment; but when he is told at the very time of the advance that the money has not been received, no inference can arise that he has been deceived by this mode of keeping the accounts. Probably it will be said on the other side, that Lord *Foley* being surety for Lord *Alvanley*, has a claim on these sums of money against the defendant, and therefore that the latter is bound to retain them until that claim is settled, but the Court cannot enter into any examination of the relative rights between Lord *Foley* and the defendant. Whatever claim the latter may have on the former is wholly irrelevant to the present question. It would be too much to expect of these plaintiffs, who are merely the assignees of a bankrupt estate, to be cognizant of the relations which may exist between Lord *Foley* and the defendant, and to compel them in this action to defend him against his Lordship's claim. That would be a very strange and anomalous proceeding. The next ground of defence on the other side will be, that it must be inferred from the facts here found, that the sum of 7146*l.*, which Lord *Alvanley* paid under the pressure of an application from the attorney, was paid on the *annuity* account, and not on the *bill* account between him and the bankrupts, and consequently that the defendant is entitled to have some part of that money allowed him by way of set-off against the present claim. Now no such fact is expressly found by the case, and it cannot be inferred from the statement made by the arbitrator. It appears that the bill account pressed very hard upon Lord *Alvanley*, and that he was paying money to the bankrupts for the purpose of retiring their acceptances in his favour. The onus lay upon the defendant to shew that the sum of 7146*l.* was paid specifically on the annuity account; but that he has not done, and the fact not having been found by the arbitrator, the Court cannot place itself in loco of a



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jury, and presume facts which are not distinctly proved, *Palmer v. Johnson* (a). [*Bayley, J.* That is so with respect to a special verdict; but upon a special case, the Court draws the same conclusion that the jury ought to have drawn]. But still it lay upon the defendant to make out that this money was paid by Lord *Alvanley*, specifically on the annuity account, and it ought not to rest as matter of presumption, arising upon the statement of the arbitrator. It is clear that at the time the money was paid, Lord *Alvanley* himself did not stipulate that the money should be paid expressly to the discharge of the annuities, and therefore the bankrupts had the option of placing it to which ever account they pleased, and as the pressure lay on the bill account, they were justified in applying it to that object. But the matter does not rest there, for in a letter, afterwards written by Lord *Alvanley* to the bankrupts, he admitted the correctness of the account, and found no fault with that application of the money. This, therefore, amounts to an acknowledgment by him, that the money had been so appropriated with his authority. Assuming, however, that the Court should draw a different conclusion from the statement made by the arbitrator, and that the money was applicable to the annuity account, what division of it could the Court make among the persons to whose account it is supposed to be made? There are six annuitants, but there is no statement of the amount of their respective claims, and therefore the Court has no means of making an equitable division of the money amongst them, even if it had the power, and chose to exercise such a power of distribution. It might happen that some of the annuities were longer in arrear than others; in which case they ought to be satisfied first, and the result might be, that the fund would be exhausted before the defendant's right to a rateable proportion of it could arise. The result, therefore, with respect to Lord *Alvanley's*

(a) 2 Wils. 163.

annuity is, that as the bankrupts had advanced to the defendant the sum of 1343*l.* 15*s.* out of their own funds, without having received it of his lordship, the assignees are entitled to recover it back, and this claim cannot be invalidated by any other circumstance stated in the case. Second, as to *Rowley's* annuity; that was granted in 1809, and secured by the assignment of leasehold property to *Howard*, in trust for securing the payment of the annuity in case of arrear, by sale or otherwise. *Rowley* became bankrupt in 1811, when *Howard* entered into the receipt of the rents and profits of the premises, but after deducting all expenses, the net proceeds were not sufficient to pay the annuity. The bankrupts had made advances to General *Picton*, which the proceeds of the estate would not cover, and therefore for those advances plus the receipts, their assignees are entitled to recover in this action. It is clear that if the General and the defendant were one and the same person, this result would follow; but since the defendant is the General's executor, he is liable in that character for the advances so made. The defendant is not at all injured by this mode of considering the subject. *Howard* being merely the trustee, paid more than the estate produced, and *Rowley*, the grantor, having become bankrupt, the General had a right to look to him personally. Bankruptcy is a public act, and the General was bound to know whether *Rowley*, as his debtor, (and whom he ought to keep in his eye), was or was not in a condition to pay. Then as to the question of interest:—the bills given by the bankrupts to the defendant, on account of Lord *Alvanley's* annuity, are to be considered as accommodation bills, which the defendant was bound to provide for when they fell due. This he did not do, and the bankrupts having honoured them out of their own funds, and the defendant having had all the benefit of the money in the mean time, a claim of interest arises; by way of damages, for the detention of the debt. On these grounds the plaintiffs are entitled to a verdict, and with the assistance of the Court,

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as to the principle on which the calculation is to take place, the sum for which it is to be entered can be ascertained.

*J. Evans*, contra, was stopped by the Court.

ABBOTT, C. J.—There are two points on which the Court will not trouble Mr. *Evans*. First, as to the claim of interest, we think that the plaintiff cannot establish any claim to interest. By law interest is not due for money lent, unless from the usage of trade, or the dealings between the parties a contract for interest is to be implied, or there has been an express promise to pay interest (a). Now here no such contract or promise arises. It does not appear that in any of the dealings between these parties, a charge of interest has ever been brought into account on the one side or the other; but an additional reason in this case why the plaintiffs should not be allowed to charge interest on the sum of 1000*l.* is, that it is manifest *Howard* and *Gibbs* allowed the defendant to draw that sum, in order to keep him quiet, and prevent him at the moment from urging a claim upon Lord *Alvanley*, which he would otherwise have enforced. That advance, therefore, having been made by them to serve their own purposes, we think there is no pretence for making any claim upon it for interest. Secondly, as to *Rowley's* annuity; if this were the case of a man giving credit for, or paying money, by mistake, there is no doubt it would be recoverable back; but this is not that case. It appears that *Howard* and *Gibbs*, with their eyes open, and knowing (as they must be assumed to know) how much money they had really obtained from *Rowley's* leasehold property, towards the payment of the annuity, think fit from time to time, and for a long period, to give credit to the General in his life-time, and to the defendant, after the General's death, for the whole of this money, as money

(a) *De Havilland v. Bowerbank*, 1 Camp. 50.

actually received on their account. During the period in question it was most important to *Howard* and *Gibbs*, with regard to the system on which they were then conducting their business, to make every body, and particularly their immediate customers, believe that the annuities were duly paid; and they having therefore thought fit to credit the General, in his life-time, and after his death, the defendant, with these sums as money received, and thereby induced them respectively to consider the money as their own, and for which they had a right to draw, we think it would be most unjust to allow *Howard* and *Gibbs* themselves, (if they had not become bankrupts), or their assignees, who stand in the same situation, to say at last to the defendant, "you must pay us all this money back." We are therefore all of opinion that the plaintiffs are not entitled to recover back the sums which *Howard* and *Gibbs* have paid to the defendant and his brother on account of *Rowley's* annuity. The remaining point relates to *Lord Alvanley's* account. It appears that after the letter written by *Howard* and *Gibbs's* attorney, sums of money amounting to 7146*l.* were paid to the bankrupts. That letter, it is to be observed, was addressed not merely to *Lord Alvanley*, but to *Lord Foley*. Now *Lord Foley* has a strong interest in saying that "the money paid in pursuance of this letter shall be considered as paid in my relief as surety for *Lord Alvanley*." That object would be defeated if we were not to allow him the benefit of those payments. We find that *Lord Alvanley*, *Lord Foley*, and the attorney are meeting together upon the subject of the annuities, and we cannot but suppose that *Lord Alvanley* would be most anxious to let *Lord Foley* understand that he had relieved him from the demands which were then pressing upon him in respect of the annuities. What takes place afterwards in the appropriation of the money to the bill account, is behind the back of *Lord Foley*, who might have reasonable ground for believing that the money was paid in consequence of the attorney's letter urging pay-

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ment of money to satisfy the annuitants; and the question is, whether Lord *Foley* has not a right to insist that the money was paid in pursuance of that letter, and ought to be applied in discharge of those annuities for which he had become surety. The question, therefore, to which Mr. *Evans* will have now to direct his attention is, whether any and what sum received by *Howard* and *Gibbs* can be considered as received in pursuance of the attorney's letter to Lord *Alvanley* and Lord *Foley*, and how that sum is to be appropriated.


*J. Evans*, for the defendant. Upon the case as stated, the defendant is utterly discharged from any liability to *Howard* and *Gibbs*, or their assignees. In the first place, it appears that *Howard* and *Gibbs* were the agents both for the grantors and grantees of the annuities. Now it is a settled principle that if the agent for two parties chooses to debit one and credit the other for a sum of money, and charge a commission thereon, and it afterwards turns out that the agent has not in fact been paid, he must abide by his own act, and cannot afterwards recover from the party whom he has credited. Indeed this very point was decided in *Williamson v. Goold*, and *Carroll v. Goold* (a). The only difference between those cases and this is, that here *Howard* and *Gibbs* informed the defendant at the time the credit was given that they had not then actually received the money. This was a year before they became bankrupts, but after that they gave the defendant no notice that the money had not been paid. By their silence upon the subject the defendant was led to believe that the money had at last been paid, although not immediately, and therefore having neglected to give him notice to the contrary, for so long a time, they made the debt their own, and it cannot now be recovered back in this action. They being the defendant's agents through-

(a) 7 J. B. Moore, 579 & 621. 1 Bing. 171 & 193, S. C. Vide *Edgar v. Bumstead*, 1 Camp. 411, and *Simpson v. Swann*, 3 Id. 291.

out the whole of the proceedings, it was their bounden duty to give him due notice of the non-payment of the annuity, and having neglected so to do for their own purposes, they must be presumed to have received the money, and though the contrary turns out to be the fact, yet they are now estopped from saying that they had not received it. To this extent *Carroll v. Goold*, *Williamson v. Goold*, and *Hunter v. Welsh* (a) are authorities. But independently of this answer to the present action, it must now be taken that the money paid by Lord *Alvanley*, after the application by *Howard* and *Gibbs's* attorney, at their instance, was paid for the purpose of paying the annuitants, and could not be applied to the bill account. The bankrupts applied that money to a purpose for which it was never intended, and as the defendant was entitled to a portion of it, in discharge of the arrears due to him from Lord *Alvanley*, it must be considered, that any supposed claim they had against the defendant, is more than covered by the money so received from Lord *Alvanley*. It is clear that, under the circumstances in which that money was paid, Lord *Foley's* liability as surety would be discharged, and, consequently, the defendant could only look to the money so paid, as the fund to satisfy his claim on Lord *Alvanley*.

*Hill*, in reply. No answer has been given by the other side to the question proposed by the Court. It has not been shewn what proportion of the money received by *Howard* and *Gibbs* was received in consequence of their attorney's application, nor how that money, if any, is to be apportioned. Assuming that the whole of the money was paid for the purpose of being applied to satisfy the annuitants, still this difficulty arises, that some of the other annuitants may have longer arrears due to them, in which case they would have priority, and so exhaust the fund before the defendant could derive any advantage from it. The

(a) 1 Stark. N. P. C., 224.

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Court, therefore, has no data upon which any part of the money could be apportioned to the defendant. The answer to the argument, that the bankrupts ought to have given the defendant notice of the non-payment of the arrears due from Lord *Alvanley* is, that they did in fact give the defendant the only notice which was necessary, for at the time the bills were given, he was distinctly informed that the money was not received. The cases of *Carroll v. Goold*, and *Williamson v. Goold*, are perfectly distinguishable from this, because there the money was actually paid on the express understanding that it had been received from the grantor of the annuities, and therefore no analogy can be drawn between those cases and the present. Then as to the last topic urged on the other side, as there is nothing to shew that the money paid by Lord *Alvanley* was to be expressly applied to the annuity account, it cannot be pretended that Lord *Foley's* liability as surety would be discharged, even if the question of his liability could be imported into this case.

ABBOTT, C. J.—After the opinion which we have given on the other parts of the case, the only remaining question is, as to the sum of 1343*l.* which the plaintiffs seek to recover. The defendant insists that the bankrupts had received a sum of money equal to that, at the least, if not more, which ought to have been placed to his account; and certainly, if that proposition is made out, the plaintiffs cannot be entitled to recover any thing in this action. The question is, whether the bankrupts did receive from Lord *Alvanley* a sum equal to 1343*l.*, which they ought to have applied in discharge of a sum for which he would otherwise stand as debtor to the defendant in their books. Much reliance is placed by the defendant on the circumstances attending the bill of 1000*l.*, and certainly, if the bankrupts are to be considered as having paid that sum as money received to the use of the defendant, and are not at liberty to call it back, it must be deducted from the

1343/. But it seems to me that if the case rested there, the defendant would have great difficulty in enforcing his right to that sum, because at the very time when the defendant was informed that he might draw for 1000l., on the credit of the instalments due from Lord *Alvanley*, he was also told that those sums were not *then* received; and when the bill became due on the 15th *May*, he was again informed that those sums of money still remained unpaid. I think it very difficult, therefore, to say that *Howard* and *Gibbs* were bound by that transaction. But the case on behalf of the defendant, with respect to that part of the case, assumes another shape; for it appears upon the evidence, that on the 31st *October*, *Gibbs* applies to his attorney, and desires him to write to Lord *Alvanley*, and Lord *Foley*, who had become surety for Lord *Alvanley* in several annuity transactions, to demand payment of the arrears of those annuities, but *Gibbs* desires that he will so write as to make it appear that he was writing, not at the instance of *Howard* and *Gibbs*, but at the instance of the annuitants themselves; and accordingly at two different times the attorney writes letters to Lord *Alvanley* and Lord *Foley* on the subject. The question then is, whether the sums that are paid by Lord *Alvanley*, after these two letters are written by the attorney, ought to be applied in discharge of the annuities for which Lord *Foley* was surety. On the 4th or 5th *November*, *Gibbs* tells the attorney that he had received a sum of money from Lord *Alvanley*, but he did not say how much. Then, on the 6th, the attorney has an interview with Lord *Alvanley*, and presses him for further sums, several sums having then been paid. This takes place in the presence of Lord *Foley*, who appears very much hurt at the pressing demand for payment; and Lord *Alvanley* then promises the attorney that he should be paid a handsome sum the same afternoon. None is sent, however, in the afternoon, but next day Lord *Alvanley* goes to the chambers of the attorney and throws down bank notes to the amount of 2800l. The

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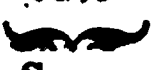


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money is offered to the attorney, evidently as the agent of the annuitants in whose behalf he had applied; but the attorney will not receive it, [though the party to write the letter], saying, that Mr. *Gibbs* is the agent to receive it. Mr. *Gibbs* then takes up the bank notes, and then Lord *Alvanley* concludes the interview by saying that he will pay some more money in a few days; and it appears that on the 10th *November* he paid two sums of 500*l.*, and between the 1st and 10th *November* he had paid altogether sums amounting to 7146*l.* It is contended on the part of the plaintiffs, that *Howard* and *Gibbs* had a right to apply these sums of money, not to the annuity, but to the bill account, and perhaps, as between them and Lord *Alvanley*, they might be entitled so to do; but I think Lord *Foley* had a right to interfere, and say, "No, you shall not apply this money to the bill account; the money has been obtained in consequence of your application to Lord *Alvanley* and myself, and therefore I, as surety for Lord *Alvanley*, have a right to see the money applied in my relief, to the payment of those annuities for which I am surety." It is quite clear that the transaction has been so managed as to deprive the defendant of his remedy against Lord *Foley*, because the parties have not complied with the evident understanding that this money was to be applied in payment of the annuities. I am therefore of opinion, that the entire sum of 7140*l.*, paid between the 1st and 10th of *November*, must be placed to the account of the annuitants in whose behalf the attorney wrote to Lord *Alvanley* and Lord *Foley*. Now taking the sum for which the application was made to be 9000*l.*, and the sum paid to be 7140*l.*, the difference will be 1860*l.* At the time when the attorney's application was made, there was about 1881*l.* due to the defendant. The proportion of the sum of 7140*l.* applicable to the payment of 1881*l.*, will be about 1494*l.*, so that the sum of 1340*l.*, claimed by the plaintiffs, will be more than covered. Without attending, however, to the precise calculation of figures, it is clear

that the sum now claimed by the plaintiffs will be exceeded by the portion of the 7140*l.*, to which the defendant would be entitled. Under these circumstances, I am of opinion that the defendant is entitled to judgment.

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BAYLEY, J.—I agree with my Lord Chief Justice in the opinion delivered by him on this complicated case. There are three sums in dispute. Two with reference to *Rowley's* and Lord *Alvanley's* annuities, which it is insisted on the part of the plaintiffs have been improperly credited to the defendant, and therefore ought to be struck out of the account between the bankrupts and the defendant. The third sum is for interest charged upon the first two sums, assuming that they ought to be struck out of the account credit. With respect to *Rowley's* annuity, I have nothing to add to what has already been said by the Court, but I take it to be quite clear, that if an agent, treating with his principal, and being under an obligation to receive money for him, and his duty being to communicate to him from time to time, whether the money has or has not been received, and he renders accounts, stating that the money is received, he is bound by those accounts, unless he is in a condition to shew that such statement has arisen from a mistake in his mode of keeping the accounts. But if he is not able so to do, I think he is bound by his statement, and is not at liberty afterwards to come in and say, "It is true, I told you at *first* that the money was received; but in fact it is not received; the debtor is now become insolvent; the money will never be received, and therefore you must reimburse me for what I have given you credit, inasmuch as you were not entitled to be paid at the time I gave you the money." It appears to me that it would destroy the foundation on which business must be carried on between principal and agent, if we were to allow an agent to hold that language towards his principal under such circumstances. I take it to be perfectly clear, that when an agent has deliberately and intentionally commu-

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nicated to his principal, that the money due to him has been received, he makes that admission at his peril, and he is not at liberty afterwards to recover the money back. With respect to the claim of interest on the bill for 1000*l.*; I think it has no foundation. It is clear that if a party advances a sum of money to another by way of loan, the money lent does not carry interest, unless it can be shewn from the usage of trade, or from the dealings between the parties, that it was their intention that interest should be paid. In the case of *Bolton v. Wragg* (a), which came from the western circuit some years since, it was expressly held, that money lent does not carry interest, unless by the usage of trade, or from the dealings between the parties, a bargain to pay interest can be inferred. In the present case, there is nothing to shew that the money advanced was intended to carry interest; and it is clear, that the accommodation granted by *Howard* and *Gibbs* to the defendant, was to prevent pressure upon Lord *Alvanley*, and to hold him out to the defendant as a person whose annuities would be paid in future. I am therefore of opinion that no interest is payable upon the monies advanced on account, either of *Rowley's* or Lord *Alvanley's* annuities. Then with respect to the monies paid by Lord *Alvanley*, between the 1st and 10th *November*, I think they must be considered as applicable to the annuity, and not to the bill account, and consequently in relief of Lord *Foley*, as surety. The result of the appropriation of that money to the different annuitants who had a claim upon it, will be, that the sum now claimed by the plaintiffs will be more than covered by the defendant's share of it.

HOLROYD, J. (b), was of the same opinion.

Judgment for the defendant.

(a) Not reported.

(b) *Littledale*, J., was in the Bail Court, during the argument, and gave no opinion.

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Saturday,  
Nov. 19th.

The KING v. The INHABITANTS of WASHBROOKE.

BY an order of two justices, *Matthias Redgen* was removed from *Washbrooke* to *Ixworth Thorpe*, both in the county of *Suffolk*. On appeal, the sessions quashed the order, subject to the opinion of this Court on the following case:—


The pauper was in the year 1818 hired for a year by *Robert Burrows*, and duly served him for a year, living in a cottage which, before the act of parliament hereinafter mentioned, was situate in the parish of *Ixworth Thorpe*. The parish of *Ixworth Thorpe* adjoins to the parish of *Honington*. By an act of parliament passed in the 39 Geo. 3, entitled “An Act for dividing and allotting and inclosing the common fields, half year, or shack lands, common meadows, heaths, commonable lands, commons and waste grounds, within the parish of *Honington*, in the county of *Suffolk*,” it is, as to the perambulation of the bounds of the said parish of *Honington* enacted, “That the commissioners (by the act appointed) at their first or second meeting, to be holden after the passing of this act, shall fix and appoint some day or days for perambulating the boundaries of the said parish of *Honington*, and shall at least eight days previous to the time so fixed and appointed for such perambulation, cause notice in writing under their hands, of the time and place of beginning such perambulation, to be affixed on the most public door of the church or churches, chapel or chapels, of the respective parishes, townships or places adjoining to, or bounding the said parish of *Honington*, or if there shall be no church or chapel, then where notices of public meetings are most usually affixed within the said parishes, townships and places respectively; and also by advertisement in some provincial newspaper circulating therein, or in the vicinity thereof, to the intent that all persons interested or concerned in ascertaining such boundaries, may have an

Where an inclosure act directed the commissioners to fix and ascertain the boundaries of a parish, and advertise in a provincial newspaper the boundaries so fixed and ascertained, and that the boundaries so fixed and ascertained should be set forth and described in their award, and be final, binding, and conclusive on all parties whatsoever, and the commissioners having advertised one set of boundaries, which varied from those described in the award:—  
Held, that their award was not conclusive.

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opportunity of attending the said commissioners upon such their perambulation of the said boundaries, the better to enable them to fix and ascertain the same; and that after, and in conformity with such notice, the said commissioners shall, and they are hereby authorized and required to make such perambulation as aforesaid, and thereby, and also by the examination of witnesses upon oath, if they shall think the same expedient and necessary, (which oath any one of the commissioners is hereby empowered to administer), or by such other lawful ways and means, as they shall think proper to ascertain, fix, and settle the said boundaries, against the boundaries of such adjoining parishes, townships or places, and to cause the same to be staked, or marked out in such manner as they shall think fit. And the said commissioners shall, within one calendar month after they have ascertained, fixed, and settled the said boundaries, or within ten days previous to the next meeting of the said commissioners, cause a description thereof to be inserted in some provincial newspaper circulating as aforesaid, and the said boundaries so ascertained, fixed and settled, by the said commissioners as aforesaid, (or as hereinafter mentioned), shall also be set forth and described in their award hereinafter directed to be made, and shall be *final, binding, and conclusive* upon and against all persons whomsoever, and all rights of common, claimed by the inhabitants of any adjoining parish, township, or place, upon the lands and grounds to be divided, allotted, and inclosed, by virtue of the said act; and also all right of common claimed by the inhabitants of *Honington* aforesaid, upon the lands and grounds within such adjoining parish, township or place, shall cease and be for ever extinguished, unless the same shall be altered in the manner hereinafter for that purpose provided." And it is by the act provided, "that in case the lord of the manor in the said parish of *Honington*, or the lord or lords, lady or ladies of any adjoining manor or manors, or any owner or owners of any lands, tenements or heredita-

ments, within the said parish of *Honington*, or any such adjoining parishes, shall be dissatisfied with the determination of the said commissioners in relation to the setting out and fixing of the said boundaries, it shall be lawful for such lord or lady, lords or ladies of the said manors, or other owner or owners, being so dissatisfied, or the major part of them in value respectively, who should attend at a meeting for that purpose, in consequence of an advertisement to be inserted in some provincial newspaper circulating generally in the said county of *Suffolk*, [which said advertisement the said commissioners are hereby required to cause to be inserted within one calendar month next after notice given to the solicitor or clerk acting under them, of such dispute or disputes, and three weeks at least before such meeting], to appoint arbitrators, and in default of such appointment by the persons aforesaid, then the commissioners were to appoint arbitrators, who by examination of witnesses upon oath, if they should deem it expedient, and by such other legal ways and means as they should think proper, were to hear, settle, and finally determine the said boundaries; and that such settlement and determination of the said arbitrators should be reduced into writing, and a description of the said boundaries should be there inserted, which determination of the said arbitrators should be final, binding, and conclusive, and the said commissioners were required to act in conformity with such determination, and to set out, ascertain, fix and determine the said boundaries accordingly. Provided also, that in case the person or persons so dissatisfied with the determination of the said commissioners, should not be willing to refer the matter in dispute to arbitrators, and should give notice thereof in manner by the act directed, then and in such case, it should be lawful for such person or persons to appeal to the general quarter sessions of the peace for the said county of *Suffolk*; but in case no such reference to arbitrators should be had, proceeded in, and perfected, nor an appeal made to the quarter sessions, then the determina-


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tion of the said commissioners, touching the said boundaries, should be binding, final, and conclusive." The steps required by the act to be taken by the commissioners previously to perambulating the boundaries, were duly taken. On the 12th of *November*, 1799, the commissioners went their perambulation, in which they took the cottage in question into the parish of *Honington*. They then examined witnesses and old maps. There having been some dispute about the boundaries, the commissioners examined witnesses, and having determined the same on the 14th of *November*, directed the surveyor to mark them on a plan, and ordered the solicitor to publish them, pursuant to the directions of the act. In the *Bury Post* of *January 29th*, 1800, a provincial paper circulating in the parish of *Honington*, and the several parishes adjoining thereto, there appeared an advertisement of the boundaries. There was no arbitration, nor any appeal to the sessions as to the boundary advertised in the newspaper. The commissioners made their award on the 17th of *September*, 1801. By the boundary as advertised, the cottage was left in the parish of *Ixworth Thorpe*, wherein it was originally situated. By the boundary as laid down in the award, and marked in the plan attached to the award, it was taken into *Honington*. No reason is assigned, either in the proceedings or in the award, for the deviation in the description between the advertisement and the award. The question for the opinion of the Court is, whether, under the circumstances, the cottage in which the pauper slept, is in the parish of *Honington*, or the parish of *Ixworth Thorpe*.

Dover and *Dundas*, in support of the order of sessions. The act of parliament declares, that the decision of the commissioners respecting the boundaries of the two parishes, shall be final, binding, and conclusive. The award itself must be considered as the final decision, and the advertisement, which will be relied upon on the other side, cannot affect the question, inasmuch as it was inadmissible

in evidence at the sessions. By the award, the cottage in which the pauper slept, was determined to be in *Hornington*, and consequently he is there settled. The only object of the advertisement, which the commissioners were required to publish in the provincial newspapers, was to give notice to lords of manors, and owners of land, that if they were dissatisfied with the boundaries set out by the commissioners, they might have the objection remedied, either by a reference to arbitrators, or by appeal to the sessions; but in default of any reference or appeal, then the decision of the commissioners, (which is their award), should be final, binding, and conclusive, upon all parties whatsoever. After the lapse of twenty-four years, no extrinsic evidence can be admitted to contradict the award itself. The only case in which such evidence was admitted, was *Rex v. St. Mary, in Bury St. Edmunds* (a). All that was there determined, however, was, that the decision of the commissioners was not to have a retrospective effect so as to be conclusive with respect to the boundaries of the two parishes, previous to the passing of the inclosure act, but nothing which fell either from the counsel in argument, or the bench in judgment, tended to impeach the award as to its conclusiveness respecting the boundaries, *from and after* it was made. Here is an award made in pursuance of the authority given by the statute, and it is therefore binding and conclusive between the parties. But the cases of *Moody v. Thurston* (b), and the *Earl of Radnor v. Reeve* (c), decide this principle, that if the judgment of commissioners in certain cases be declared final by the statute, their judgment cannot afterwards be questioned. This is not like the case of *Davison v. Gill* (d), which arose upon the Highway Act, 13 Geo. 3, c. 78, s. 19. There the order which had been made, was not conformable with the directions of the statute, and the objection appearing on the face of the order itself, the Court held that it might be taken advantage of,


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(a) 4 B. & A. 462.

(b) 1 Stra. 481.

(c) 2 Bos. & Pul. 391.

(d) 1 East, 64.

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though it had been confirmed on appeal by the sessions. But here it is not pretended that there is either any patent or latent defect appearing on the award. If the argument on the other side could prevail, it would have the effect of declaring the award to be a nullity, which would be productive of the greatest inconvenience, for parties who have occupied and enjoyed lands for the last twenty years under allotments made by the commissioners, might now be disturbed by the resumption of rights of common which had previously existed, and even the parson of *Irworth Thorpe* might set up a claim for tithes, notwithstanding the legislative extinguishment of tithes upon the allotted lands. [*Bayley, J.* I do not think that the award would be bad as it respects the lands divided and allotted]. Then the award must be good for all purposes, and being good on the face of it, it cannot be impeached. These commissioners were acting in the discharge of a public duty, and every intendment must be made in favour of what they have done, *Williams v. The East India Company (a)*, *Rex v. Haslingfield (b)*. In the case of the *Over Kellet* inclosure act (c), on a motion respecting an award of commissioners under an inclosure act, the Court is reported to have said, "We may punish upon this, if there be any corruption, or enforce its execution by mandamus; but we are not to interpret or set aside these awards upon complaint of their obscurity," &c. In the present case no fraud is alleged, nor is any obscurity suggested, and therefore the Court will hold this award conclusive, especially as a contrary decision might invalidate the rights of a great number of persons, who have now acted upon it without question for a period of twenty-four years.


E. Alderson, and *B. Andrews*, (with whom was *Eagle*),
 contra. The award of the commissioners in this case is


(a) 3 East, 192.

(b) 2 M. & S. 558.

(c) Hil. 38 Geo. 3, K. B., not reported, but cited by Mr. Tidd, in his Practice, 8th ed. 897.

not final, binding, and conclusive. If the argument on the other side be correct, it was competent for the commissioners to *advertise* one set of boundaries, and by their award to fix another, which is contrary to the plain language of the act. By the inclosure act, the commissioners are required to fix and ascertain the boundaries, and after they have done so, they are to cause a description thereof to be inserted in some provincial newspaper, "and the said boundaries so *ascertained, fixed, and settled*, shall also be set forth and described in their award, and shall be final, binding, and conclusive." It is clear, therefore, that the boundaries described in the advertisement, were to be binding, final, and conclusive, and not the boundaries set down in the award, unless they corresponded with those advertised. Here the boundaries stated in the award are different from those advertised, and therefore the award is not conclusive. After having advertised what the boundaries are to be, the commissioners of their own authority had no power to alter them. The object of the advertisement was to give notoriety to the change in the old boundaries. No notoriety is given to the award, because that is a mere ministerial act, and supposed to be done conformably with the previous determination advertised; but if it departs from the advertisement, it is not binding. Looking at the newspaper, the parties interested would see a set of boundaries advertised to which no objection could be made; but if they had the opportunity of seeing the award, they would find such a departure as might be very unsatisfactory. If the commissioners, having advertised one set of boundaries, thought proper to set down another in their award, it would be a fraud upon the law which nothing could sanction. Unless, therefore, it be laid down that commissioners under an inclosure act may advertise one set of boundaries, and afterwards alter them at their own will and pleasure, it is impossible to contend that this award is conclusive. Admitting that every presumption is to be made in favour of the acts of persons

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filling a public character, still where a limited authority is given to commissioners, and that has manifestly not been pursued, no such presumption can be available.

ABBOTT, C. J.—I am of opinion that the commissioners have not pursued the authority given them by the act of parliament. In the first place, they are to make their perambulation, and ascertain, fix, and settle the boundaries of the adjoining parishes, and to cause the same to be staked or marked out. They are then, within one calendar month after they have fixed and settled the boundaries, to cause a description thereof to be inserted in some provincial newspaper circulating in the vicinity; and the boundaries “*so ascertained, fixed, and settled* by the commissioners; shall also be set forth and described in their award, and shall be final, binding, and conclusive.” Now that which is to be final, binding, and conclusive, is not merely what is set out in the award, but what has been *previously* ascertained and copied into the award. The award here does not describe that which had been previously fixed and ascertained to be the boundaries, and consequently it does not pursue the authority given by the act. The act requires that such an alteration in the boundaries as the commissioners shall fix and ascertain, shall be advertised, and then the boundaries so fixed and ascertained, shall be set forth and described in the award. This has not been done, and therefore the award is not conclusive as it respects the question raised in this particular case. This decision may possibly lead to some inconvenience, for which I am sorry, but I trust this is only a slip which will not affect the general interests of the two parishes.

BAYLEY, J.—I am of the same opinion. I think the commissioners have not pursued the authority given to them, and therefore what was in *Ixworth Thorpe* before the inclosure act, remains in that parish. I do not think

the effect of this decision will be to make the whole award bad. It only goes to the boundary, and does not touch the allotments made under the authority of the act.

HOLROYD, J.—Where a special limited authority is given by act of parliament, it must be pursued strictly throughout all its conditions and qualifications, and is not to be considered merely as directory. Here the commissioners seem not to have pursued the authority which the act gives, and consequently, as respects the boundaries, the award is not conclusive.

LITLEDALE, J., concurred.

Order of sessions quashed.

SHADDICK, administratrix of J. SHADDICK, deceased, v.
BENNETT, gent., one, &c.

THIS was a rule nisi for entering a suggestion on the roll, pursuant to the *London Court of Requests' act*, 39 and 40 Geo. 3, c. 104, s. 12 (a), to deprive the plaintiff of costs. The plaintiff, who was administratrix of one *J. Shaddick*, a clerk in the court of Chancery, deceased, had brought an action of assumpsit against the defendant, an attorney of this Court, to recover from him the sum of 26*l.*, for business done for him by the intestate as his clerk in Court, from the year 1807, to the year 1818, when he died. The defendant pleaded first the general issue, non-assumpsit; and second, the Statute of Limitations. At the trial the plaintiff proved business done to the amount charged, and in order to bar the Statute of Limitations, produced a letter from the defendant, dated in *January*, 1825, in which he contended

(a) Which enacts, "that if any action shall be commenced in any other court than the said Court of Requests, for any debt not exceeding the sum of 5*l.*, the plaintiff shall not, by reason of a verdict for him, be entitled to any costs whatever."

All the Court of Requests' acts are in *pari materia*, and they must all receive a similar construction.


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If a debt be reduced below 5*l.* by the plea of the Statute of Limitations, the case is within the *London Court of Requests' act*, 39 & 40 Geo. 3, c. 104, s. 12, and the plaintiff is not entitled to costs.

The sum actually recovered must be considered as the debt for which the action was brought, within the *London Court of Requests' act*, 39 & 40 Geo. 3, c. 104, s. 12.

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that he was not indebted to the intestate in more than 3*l*. Upon this evidence a verdict was found for the plaintiff for 3*l*., and the defendant obtained the present rule, against which,

Tindal now shewed cause. This case is not within the *London Court of Requests'* act; because the debt for which the action was brought, originally exceeded 5*l*. The Statute of Limitations reduced the debt to 3*l*., so as to bar the remedy beyond that sum, but it did not destroy the original debt, for which the action was brought; and if the defendant had not resorted to that statute as a defence, which the plaintiff could not anticipate his doing, the verdict must have been for the entire sum claimed. *Clark v. Askew* (a), and *Bateman v. Smith* (b), will be relied on in support of this rule, but they do not apply to this case, because they were decided upon other acts of parliament, the language of which differs materially from that of the present. The first of those cases was upon the *Southwark Court of Requests'* act, 22 *Geo. 2*, c. 47, which provides, that if it shall appear to the judge, that the debt to be recovered by the plaintiff does not amount to 40*s*., the plaintiff shall pay the defendant costs; and the second was upon the *Middlesex County Court* act, 23 *Geo. 2*, c. 33, which provides, that where the jury shall find less than 40*s*. damages, the plaintiff shall not recover, but pay costs; and therefore, as the debt in those cases was reduced below 40*s*., in the one by part payment, and in the other by the infancy of the defendant, they were properly held to be within those acts of parliament. But there is one more recent case, which does apply to the present, and the decision in which supports the present argument. *Harsant v. Larkin* (c). The question there arose upon the *Rochester Court of Requests'* acts, 22 *Geo. 3*, c. 27; and 48 *Geo. 3*, c. 54. By the former, debts under 40*s*., contracted within the jurisdiction of the

(a) 8 East, 28. (b) 14 East, 301. (c) 7 J. B. Moore, 68. S. C. 3 B. & B. 257.

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court, are to be sued for in that court. By the latter, the jurisdiction of the court is extended to sums not exceeding 5*l.*; and plaintiffs suing in the superior courts for sums recoverable under either of the acts, are to be refused costs, notwithstanding a verdict in their favour. But the latter act excludes any jurisdiction over debts, being the balance of an account on demand, originally exceeding 5*l.* The plaintiff sued in a superior court for 34*l.* 5*s.* 1*d.*, ascertained by a surveyor appointed by the defendant and himself to be due to him for measured work and labour done within the jurisdiction of the Court of Requests. The defendant proved payments to the amount of 24*l.* 18*s.*, and the jury estimating the work at only 26*l.*, found for the plaintiff only 1*l.* 2*s.* damages. It was held that this was not a case in which the defendant was entitled under the 48 Geo. 3, c. 51, to enter a suggestion to deprive the plaintiff of his costs. Now that is a case strongly in point, and ought to decide the present in favour of the plaintiff. Besides, in this case the plaintiff is an administratrix, and as such would not at common law be liable to any costs; it would be extremely hard, therefore, to construe this statute, so as to render her liable to double costs; and it has been held in one case, upon the *Middlesex* County Court act, that a defendant executor was not entitled to a suggestion on the roll, *Ailway v. Burrows* (a). [Abbott, C. J. That was upon the ground that the statute did not give the county court jurisdiction over executors; and the cases are entirely different, for there the defendant was an executor, and here the plaintiff is an administratrix (b)]. At any rate there is this distinction between the present and all the decided cases upon this subject, that here the debt is only reduced by the Statute of Limitations, which does not have the effect of destroying the original debt, but simply of barring the remedy.

Adolphus, contra. The jury have found that the debt

(a) 1 Doug. 263.

(b) Vide *Wase v. Wyburd*, 1 Doug. 246.

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owing to the plaintiff was less than 5*l.*, therefore the Court must take that to be the debt for which the action was brought. These acts of parliament differ in their language, but they are all in *pari materiâ*, and must all receive a similar construction. *Benson v. Hemming (a)*. (Here the Court stopped him).

ABBOTT, C. J.—I think the sum actually recovered must be considered as the debt for which the action was brought; and the verdict is the only evidence to which we can look for the purpose of ascertaining what is the sum recovered. A different rule of practice would open a wide door to litigation. The language of the statutes from which these Courts of Requests derive jurisdiction, certainly varies, but they have all one common object, and should therefore all receive a similar construction. It was held, in *Horn v. Hughes (b)*, with reference to this very act, that where the debt is reduced below 5*l.* by part payment, the case is within the act; and its being reduced here by the Statute of Limitations, seems to me to make no difference, because the law must be considered as regarding only those debts, the payment of which there is a legal remedy to enforce; and indeed no others can be called debts, in the legal sense of the word. I am, therefore, of opinion that this rule must be made absolute.

The other judges concurred.

Rule absolute.

(a) 2 Barnes, 282, 1st ed.

(b) 8 East, 347.

Monday,
November 21.

SMITH V. KENDAL.

Affidavit of
debt on bond
must shew
that the bond
is *due and payable* at the time of the arrest, otherwise the defendant will be discharged on common bail.

COMYN moved to discharge the defendant out of custody on filing common bail, for an objection to the affidavit of

debt. The action was upon a bond, but the affidavit to hold to bail did not state that the bond was then *due and payable*; and he likened this to the case of bills of exchange and promissory notes, in which the affidavit must shew the bill or note to be due and payable. No bail above had been put in.

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BAYLEY, J. (the only judge in Court) thought the analogy perfect, and granted a rule nisi.

No cause being afterwards shewn, the rule was made

Absolute.

BELL v. VINCENT.

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WATSON, on a former day, had obtained a rule nisi to set aside the service of the bill of *Middlesex*, and notice of declaration thereon for irregularity. On the 7th November, the attorney's clerk went to the defendant for the purpose of serving him with a copy of the bill of *Middlesex*, but the defendant refused to take it, whereupon the clerk placed it upon the defendant's shoulder, and went away. Next day he served the defendant with another copy of the bill of *Middlesex*, with notice of declaration. The objection to the proceeding was, that placing the copy of the bill of *Middlesex* on the defendant's shoulder was no service; and that supposing it to be good, it was waived by the service of the second copy on the next day; and consequently service of the bill of *Middlesex*, with notice of declaration at the same time, was irregular.

Service of a copy of the bill of *Middlesex*, by placing it on the defendant's shoulder, after he has refused to take it, is sufficient; and if he is served the next day with another copy, and with notice of declaration at the same time, there is no irregularity.

R. V. Richards, contrà, was now stopped by the Court.

BAYLEY, J.—I think the service of the bill of *Middlesex* on the 7th November was sufficient; but the attorney's clerk, pro majore cautela, serves the defendant with a second copy on the 8th, with notice of declaration. The

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service of the second copy was unnecessary and useless, and therefore there is an interval between the service of the first, and the notice of declaration, and consequently the proceedings are regular.

PER CUR.

Rule discharged.

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The KING v. ROBERT BELK.

An insolvent was brought up at the assizes under the compulsory clauses of the Lords' Act, 32 Geo. 3, c. 28, ss. 16 and 17, to deliver in a schedule of his estate, and not being prepared to do so then, was remanded generally; but as more than 60 days would have elapsed before the next assizes, the Court, at the instance of the prisoner, made an order upon the gaoler to bring him up at the subsequent assizes, for examination, notwithstanding the lapse of 60 days.

THIS defendant being in execution in the county gaol for *Essex*, under an attachment for a contempt in not performing an award, and not paying the costs of an action of ejectment, in which such award had been made, was brought up at the last *Lent* assizes for *Essex*, at the instance of the prosecutor, to deliver in a schedule of his estate and effects under the compulsory clauses of the Lords' Act, 32 Geo. 2, c. 28, ss. 16 and 17 (a). At those assizes the prisoner was brought up accordingly for that purpose, but was ordered to be remanded *generally*, not being then ready to give in his schedule pursuant to the notice which had been served upon him conformably to the statute. By the 17th sec. of the statute, if the prisoner brought up, shall neglect or refuse to deliver in and subscribe a just and true account of his whole estate and effects *in the Court* in which he shall be brought up, or *at the assizes*, as the case may happen to be, within twenty days next after the time of giving him the notice, or within *sixty days then next following*, without sufficient excuse, he may be indicted for his offence, and if found guilty, transported for seven years, as in cases of felony, &c. Between the *Lent* and the *Summer* assizes more than *sixty* days would have expired, and consequently the defendant could not possibly comply with the strict terms of the act, by delivering a schedule "in the Court;" but in the interval, and before the 60 days

(a) See *Rex v. Curwen*, 1 J. B. Moore, 494. 8 Taunt. 57, S. C.

had elapsed, he sent, per post, the copy of a schedule, to the prosecutor, notifying at the same time, that he intended to deliver in the original at the then ensuing assizes. At the last *Summer* assizes, the learned judge who presided on the crown side, thought he had no jurisdiction over the matter without an order from this Court for the examination of the prisoner, inasmuch as the *sixty* days had elapsed, and therefore the prisoner was remanded to his former custody.

Jessopp now moved on behalf of the prisoner, for an order on the gaoler to carry the defendant before the justices who should hold the *next assizes* in and for the county of *Essex*, in order that he might be examined touching the schedule of his estate and effects.

The COURT, under the circumstances stated, and advert- ing to the provisions of the Lords' Act, thought they had jurisdiction to make such an order, and accordingly

Jessopp took a rule in the terms prayed (a).

(a) At the following *Winter* gaol delivery, held under a special commis- sion, the prisoner was brought up before *Hallock*, B., for the purpose of being examined under the order above-mentioned, but the learned judge was of opinion that he had no authority to take cognizance of the case, inasmuch as the order had reference to the "next assizes," and not to a *special gaol delivery*; and the prisoner was again remanded until the fol- lowing *Lent* assizes.

At the *Lent* assizes 1826, the prisoner was brought up, and examined by virtue of the order above mentioned. He delivered in a schedule in which no mention was made of a *claim*, which he *supposed* he had to certain freehold property in the counties of *Oxford* and *Bucks*. It was urged that as he had no possessory interest in the property in ques- tion, or even any reasonable ground for expecting ever to enjoy it, he was not bound to insert a fanciful claim, which might never be realized. The prisoner had brought two ejectments for the premises, in both of which he had failed, and he was now in execution upon an attachment for not paying the costs of one of those ejectments. For the prosecutor, it was insisted, that as the prisoner avowed that he had a claim to the property in question, and hoped to succeed therein, he was bound to in- sert it in his schedule, in order that it might be prosecuted for the benefit

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An order to bring up an insol- vent under the Lords' Act at the "next assizes," will not authorize the examination of the prisoner at a *special gaol de- livery*.

An insolvent is bound to insert in his schedule a *claim* which he even supposes himself errone- ously to have upon property, as part of his es- tate and effects within the mean- ing of the com- pulsory clauses of the Lords' Act.

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A misdescription of a party applying to the crown for a license to trade with an enemy, if made without fraud, does not vacate the license, or vitiate a policy effected upon it.

VAUGHAN v. LEMCKE, (in error) (a).

WRIT of error from the Common Pleas. The plaintiff below declared in assumpsit a policy of insurance, dated the 30th of *August*, 1810, at and from *Heligoland* to any port or ports in the *Baltic* and the *Gulph of Finland*, against all risks, including the risk of craft, and until safely warehoused in the warehouse of the consignees, at the final ports or places of discharge, with liberty to carry and exchange real or simulated papers and clearances, and to seek, join, and exchange convoys, or ship or ships, with leave to proceed and sail to, and touch and stay at, any ports or places whatsoever, and to touch, stay, discharge, and reload any cargoes at any port in *Sweden*; and to wait for orders, and for any purposes whatsoever, at or off any ports or places they might touch at, and to return to any port or ports, without being deemed a deviation. At the foot of the policy there was a memorandum, "On goods as shall be declared and valued hereafter," and indorsed on the policy was a declaration specifying the goods, and valuing them at 10,150*l.*, and stating the insurance to be on those goods, per the *Vrouw Hendricka*, Captain *Hendricks*. The plaintiff below declared as for a total loss. Plea, non-assumpsit, and issue thereon. At the trial, a verdict was found for the plaintiff, damages 500*l.*, subject to the opinion of the Court below upon a special case setting out the following facts:—

The plaintiff was a merchant at *Hanover*, and a native of his creditors, even though it might ultimately turn out to be worth nothing.

ALEXANDER, C. B., said he certainly should not discharge the prisoner until he inserted in his schedule the claim or pretended claim which he had to the estates mentioned.

The prisoner having amended his schedule in the particular desired, took the oath prescribed in the statute and was discharged.

Dowling for the prosecutor, and *Jessopp* for the prisoner.

(a) See 8 J. B. Moore, 646. 1 Bing. 473, S. C.

of that country, and at the time of effecting the policy, of granting the license, of the voyage, and of the loss, was residing within the *Hanoverian* dominions. The plaintiff in 1810 was the owner of goods then lying in *Heligoland*, consisting of *British* colonial produce, which had been imported thither from this country, and were then in the possession of his agents there. *Heligoland* was captured by the *British* forces in 1809, and has since continued under the dominion of *Great Britain*. The plaintiff having resolved to send these goods to some of the neutral ports in the *Baltic*, employed as his agent for that purpose one *Hampe*, and sent him to *Heligoland* in that character. The plaintiff in *August*, 1810, wrote to one *Klingender*, his agent in *London*, instructing him to effect an insurance to cover the adventure; and in consequence thereof, and prior to any vessel being chartered, *Klingender* effected the policy declared on, which the defendant subscribed for 500*l*. Upon *Hampe*'s arrival at *Heligoland*, he wrote to *Klingender*, directing him to charter a vessel and send her to *Heligoland*, for the purpose of loading her with the plaintiff's goods; and he also directed *Klingender* to procure and send him a license. *Klingender* accordingly, on the 27th of *August*, 1810, chartered the *Vrouw Hendricka*, a neutral vessel, and, by the terms of the charter-party, she was to proceed to *Heligoland*, or so near thereto as she could safely get, and then load a complete cargo of lawful and permitted merchandise, and being so loaded to proceed therewith to a port in the *Baltic*, but not higher up than *Koningsberg*, and deliver the same. *Klingender* also in pursuance of his instructions applied for and obtained the following order in council and license:—

“ At the Council Chamber, *Whitehall*,
The 28th day of *August*, 1810.

“ Present,

“ The Lords of his Majesty's most Honourable Privy
Council.

(“ Duplicate).

“ Whereas, there was this day read at the board, the

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humble petition of *C. F. Hampe*, of *London*, merchant, it is ordered in council that a license be granted to the petitioner for permitting a vessel, bearing any flag except the *French*, to proceed with a cargo of *British* manufactures, colonial produce, and such goods as are permitted to be exported from *Heligoland*, to any port in the *Baltic*, not under blockade, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any other neutral or hostile port, and to whomsoever such property may appear to belong, upon condition that the name and tonnage of the vessel, name of her master, and time of her clearance from *Heligoland*; shall be indorsed upon the said license; and that a certificate from the proper officer of the customs at *Heligoland* shall accompany the cargo, certifying that the same was originally exported from the united kingdom: such license to remain in force for four months from the date hereof; and at the expiration of that period, or sooner if the voyage be completed, to be deposited, as the case may be, with the commissioner of his majesty's customs at the port of *London*, or with the collectors of the customs at the out-ports. And the Right Honourable *Richard Ryder*, one of his majesty's principal secretaries of state, is hereby specially authorised to grant such licence, in case he shall see no objection thereto, annexing to such license the duplicate of this order, herewith sent for that purpose.

“ *Chetwynd.* ”

“ To all Commanders of his Majesty's Ships of War, Privateers, and all others whom it may concern, greeting:—

“ I, the undersigned, one of his majesty's principal secretaries of state, in pursuance of the authority given to me by his majesty, by order in council, under and by virtue of power given to his majesty by an act passed in the 48th year of his majesty's reign, entitled, ‘ an act to permit goods secured in warehouses in the port of *London*, to be removed to the out-ports for exportation to any part of

Europe, for empowering his majesty to direct that licenses which his majesty is authorised to grant under his sign manual, may be granted by one of his majesty's principal secretaries of state, and for enabling his majesty to permit the exportation of goods in vessels of less burthen than are now allowed by law, during the present hostilities, and until one month after the signature of the preliminary articles of peace:—and in pursuance of an order of council especially authorizing the grant of this license, a duplicate of which order of council is hereto annexed, do hereby grant this license for the purpose set forth in the said order of council, to *C. F. Hampe*, of *London*, merchant, and do hereby permit a vessel, bearing any flag except the *French*, to proceed with a cargo of *British* manufactures, colonial produce, and such goods as are permitted by law to be exported from *Heligoland* to any port in the *Baltic* not under blockade, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any neutral or hostile port, and to whomsoever such property may appear to belong; provided that the name and tonnage of the vessel, name of her master, and time of her clearance from *Heligoland*, shall be indorsed on this license, and that a certificate from the proper officer of the customs at *Heligoland* shall accompany the cargo, certifying that the same was originally exported from the United Kingdom. This license to remain in force for four months from the date hereof; and at the expiration of that period, or sooner if the voyage be completed, this license shall be deposited as the case may be, with the commissioners of his majesty's customs at the port of *London*, or with the collectors of the customs at the out-ports.

“ Given at *Whitehall*, the 28th day of *August*, 1810,
in the 50th year of his Majesty's reign.

“ *R. Ryder.*”

The indorsements and certificate required by the license

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were duly made. The *C. F. Hampe* named in the order of council and license was the *Hampe* employed by the plaintiff as above stated. The vessel proceeded to *Heligoland*, and upon her arrival there the goods specified in the policy were shipped on board by *Hampe*, the goods being the property of the plaintiff, and of the value stated in the policy. On the 17th of *September*, 1810, the vessel with her cargo sailed under convoy from *Heligoland*, *Hampe* being on board as supercargo, bound for *Swinemunde*, in the *Prussian* dominions. On the 31st of *October*, 1810, she arrived with her said cargo in the roads of *Swinemunde*, and soon after her arrival the vessel and her cargo were seized by a *Prussian* military force, and were subsequently condemned by the public authorities at *Swinemunde*, and the cargo became wholly lost to the plaintiff. Before any of these circumstances had taken place, *Hanover* was taken possession of in a hostile manner by the *French* troops, and during the whole period of the above-mentioned transaction the powers of government were exercised in *Hanover* by *Jerome Buonaparte*, the brother and ally of *Napoleon Buonaparte*, who was then at the head of the *French* government, and at war with this country; *Jerome Buonaparte* having assumed the title of king of *Westphalia*, and *Hanover* having, on the 10th of *July*, 1810, been declared by *Napoleon Buonaparte* a department of the kingdom of *Westphalia*: but these acts were never recognised by the government of this country, nor was any cession of *Hanover* made, nor any war declared between *Hanover* and this country. Either party was to be at liberty to turn this special case into a special verdict. The court of Common Pleas gave judgment for the plaintiff below upon the special case (a), which was afterwards turned into a special verdict, setting out the same facts, and which the defendant below removed into this Court upon an assignment of error.

(a) *Lemcke v. Vaughan*, 8 J. B. Moore, 646. 1 Bing. 473, S. C.

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F. Pollock, for the plaintiff in error. The judgment of the court below is erroneous, and must be reversed. The license did not protect the adventure. It was granted to an individual described upon the face of it as a merchant of *London*, but who in fact was not so; consequently there was a concealment, or misrepresentation of facts, and a fraud upon government, which rendered the license void. It was decided in *Klingender v. Bond*(a), which was an action upon the very same policy out of which the present case springs, that the description of *Hampe* as a merchant of *London*, when in fact he resided elsewhere, was a fraud upon government, which avoided the license, and barred the plaintiff's claim upon the policy. *Hampe* was a native and a resident of *Hanover*, and looking at the then state of that country, it is clear that the *British* government did not intend to grant such a license to such an individual, for he was then actually in the situation of an alien enemy. [*Bayley*, J. I think not; the inhabitants of *Hanover* cannot be considered as being then alien enemies, because *Hanover* was not ceded to *France*, nor did *Great Britain* ever declare war against *Hanover*]. At any rate the person obtaining the license was mis-described upon the face of it; and that is a fraud which invalidates the license. [*Bayley*, J. How can we say that the mis-description of *Hampe*, even if it amounts to that, was done fraudulently? The jury have not found fraud as a fact]. Nor need they. In *Mennett v. Bonham*(b), the Court held the license void for fraud, and yet there the jury had not found fraud as a fact. [*Bayley*, J. That, and the other cases of the same class, have all been over-ruled by the subsequent decision of the court of Exchequer Chamber in *Flindt v. Scott*(c)]. It is submitted not, so far as regards this particular point. Some of the observations made by the Court in *Mennett v. Bonham* are particularly applicable to this case. Lord *Ellenborough* said, "Many public inconveniences might arise from permitting an

(a) 14 East, 484.

(b) 15 East, 477.

(c) 5 Taunt. 674.

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indiscriminate intercourse to alien enemies between our own ports and those of the enemy, which might with less hazard be permitted to our own subjects; many collateral negotiations might be instituted injurious to the state in one case, which could not be expected in the other. All, however, which I demand for the security of the state, is, that it should appear, by the terms of the license, that where it is used to cover a trade by the subject of an enemy, from this country to a hostile port, such an use of it should have been within the contemplation of the government issuing it; that the government should not be hood-winked as to the real object of the parties obtaining it:" and *Bayley, J.*, said, "Two questions have been made; one upon the construction of the license; in deciding which, we ought to consider what was the intention of the crown at the time it was granted, as it may be collected from the license itself; for it should appear that the king was put in possession at the time of all the circumstances and objects to which it was to be applied." Now here, government was hoodwinked, and the king was not put in possession of all the circumstances; for *Hampe* was represented as a merchant of *London*, being at the time resident in *Hanover*, which place was under the dominion of the enemy. *Hampe*, therefore, was in the situation of an alien enemy, for so soon as the *French* took possession of *Hanover*, the inhabitants of that country ceased to be subjects of *Great Britain* and became subjects of *France*; their property became liable to seizure by the *British* government, and they themselves became the enemies of the *British* government; and to a person so situated, it is impossible to suppose that the crown could have intended to grant this license.


D. F. Jones, contrà, was stopped by the Court.

ABBOTT, C. J.—I am clearly of opinion that the judgment of the court of Common Pleas was right, and ought to be affirmed. The modern cases upon this subject have

established a different and more enlarged and liberal rule of construction than was acted upon in earlier-decisions, and I think the change is right. The rule now is, that in construing instruments of this nature, we are to look to their substance, not their form. It was decided in *Flindt v. Scott*, by the court of Exchequer Chamber, that licenses to trade with an enemy are to be construed liberally, and that though an agent, in obtaining a license, did not represent to the privy council that he applied on behalf of a hostile trader, the concealment did not vacate the license, or vitiate the policy; and if it is immaterial to the validity of the license who the person is to whom the goods belong, and how he is described, it would be very difficult to say that the mode of describing the person who actually applies for the license can be material either. Some very special cases might perhaps be imagined, in which a misdescription in that respect might be a fraud upon the crown, and might defeat the license; but this is not one of those cases; and generally speaking, it must be perfectly immaterial who the party is that applies for the license, or how he is described. *Hanover* was at the time of this transaction a part of the *British* dominions. The great object of granting these licenses was to promote the trade of *Great Britain* and her dependencies; and it would tend entirely to destroy that object, if we were to hold that the license and the policy in this case were void.

BAYLEY, J.—I am of the same opinion. When *Mennett v. Bonham*, and some of the other cases upon this subject were decided, the principles upon which these licenses have been granted, and by which they ought to be construed, were not thoroughly understood; but they have since been put upon the right footing, and I think the late decisions are those by which we ought to be guided. The earlier cases, where the licenses were held to be void, were decided upon the ground of some concealment or

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fraud, as in the *Jonge Johannes* (a); but there was no fraud or concealment in this case, and if there was, the jury ought to have found it as a fact, for, upon a special verdict, particularly, we are precluded from presuming fraud, where none is found by the jury. The general language of the license shews that it is perfectly immaterial to the meaning and intent of government in granting it, who or what the person for whom the license is obtained, or to whom the goods belong, may be; the object of government is the promotion of trade, and it would be most prejudicial to that object to say, that the plaintiff below could not recover upon this policy.

HOLROYD, J., and LITLEDALE, J., briefly expressed themselves of the same opinion.

Judgment affirmed.

(a) 4 Rob. Adm. Rep. 263.

Tuesday,
 November 22.

BARROW and another v. BELL.

Policy of insurance on goods, with a warranty against average, "unless general, or the ship be stranded." On the voyage the ship was driven by stress of weather into a harbour, at the mouth of which she struck upon an anchor, and was in danger of sinking: to prevent which, she was warped higher up in the harbour, where she took the ground, and remained fast half an hour:—Held, that the ship was stranded, within the meaning of the policy.

DECLARATION in assumpsit on a policy of insurance on goods warranted free from average, unless general, or the ship should be stranded: the first count, special, setting out all the facts; the second, general, alleging that the ship was stranded. Plea, non assumpsit, and issue thereon. At the trial before *Littledale*, J., at the London adjourned sittings after last *Michaelmas* term, the jury found a verdict for the plaintiffs, subject to the opinion of the Court upon the following case:—

At the trial before *Littledale*, J., at the London adjourned sittings after last *Michaelmas* term, the jury found a verdict for the plaintiffs, subject to the opinion of the Court upon the following case:—

The plaintiffs, who are merchants at *Manchester*, on the 18th *November*, 1822, caused to be effected a policy of insurance on the *Latona*, at and from *Liverpool* to *Gibraltar*, on goods which were warranted free from average, unless general, or the ship should be stranded. The goods insured were subsequently declared to be manufactured cottons, and valued at the sum of 5000*l.* by an indorsement on the policy. The defendant subscribed the policy for 200*l.* The plaintiffs were interested to the full amount of the sum insured. On the 11th *December* the *Latona* set sail with the goods insured on board, on her voyage from *Liverpool* to *Gibraltar*. On the 15th *December* she was compelled by contrary winds and tempestuous weather to bear away for *Holyhead*. Between eight and nine in the afternoon she took on board a pilot in *Holyhead Bay*, who piloted her into the harbour, which was thickly crowded with shipping; and while entering she was observed by some of the crew on board to have struck upon something, but her progress was not thereby retarded; she was moored under the directions of the pilot about the middle of the harbour, and in about fourteen feet water. The pilot immediately went on shore, but had scarcely quitted the ship, when it was discovered that she had sprung a leak, and he had been but a few minutes on shore, when the captain came to him and informed him that the ship was sinking. Every exertion was used at the pumps by those on board, and the pilot and captain immediately returned and brought with them four men and a boat. They found four-feet water in the hold, and rigged both pumps. Had the ship remained at her moorings she must have sunk. The cable was slipped for expedition, and the ship was warped further up the harbour towards the east end of the custom-house quay. No sails were put up, as the wind was blowing contrary to the direction in which the ship was hauled. By means of the warps the ship was drawn upon the ground, which was at a place about a quarter of a mile from where she had been

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moored. She could not be got nearer to the quay than within about seven or eight yards from the east corner of it. This took place between nine and ten o'clock, and the tide was highest between eleven and twelve. The ship lay for half an hour upon the ground, and was then as the tide rose hauled nearer to the quay, and ultimately alongside the east end of it, as high up as the steps leading on to the quay would allow. About one o'clock on the following morning the tide left her upon the ground, and she was then pumped dry, and the leak fastened by a carpenter, who came on board for that tide. On the following tide the ship was taken alongside the west end of the quay, where vessels usually discharge, and the cargo was then unladen and examined. The leak, which proved to be on the larboard side, just under the stern, and to have been caused by the ship striking upon the fluke of an anchor in coming into the harbour, was afterwards completely repaired, and the cargo reladen, and after the space of a fortnight she returned to her original moorings in the middle of the harbour. The ship would draw eight or nine-feet water, and in the place where she was first moored there would at the height of the tide be upwards of fourteen feet, but at low water in that place there would not be more than from one to two feet. At the entrance of the harbour there is at low water about seventeen feet, and it grows gradually less higher up the harbour, until it becomes quite dry. The ships in the harbour generally lie afloat both at the flood and ebb tide, but when the harbour is much crowded, as was the case when the *Latona* entered, they are obliged to be carried so high up as to be dry, and lie on the mud when the tide is out. The *Latona* proceeded upon her voyage again on the 28th December, and reached her ultimate destination at *Gibraltar* with the goods insured on board on the 12th February, 1823. The goods insured were damaged by the injury sustained to the amount of 11l. 3s. 6d. per cent. on the defendant's subscription to the policy.

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Campbell, for the plaintiffs. The short question in this case is, whether the ship was stranded within the meaning of the policy; it is confidently submitted that she was. She was driven into harbour by tempestuous weather; when brought to her moorings she was found to be in a sinking state, and she was in consequence, and in order to prevent her sinking, hauled up on the ground, where she lay for half an hour. It is true that the stranding was a wilful act, and that the damage done to the cargo did not result from that cause; but that is immaterial, because it is now settled, that where a ship is stranded, the insurer is liable for a partial loss, though such loss did not arise from the stranding. *Burnett v. Kensington (a)*, *Harman v. Vaux (b)*. In *Dobson v. Bolton (c)*, a ship having run on some wooden piles four feet under water, erected about nine yards from the shore to keep up the banks of the river, and having lain on these piles till they were cut away, this was held to be a stranding. It was held, in *Hearne v. Edmonds (d)*, that where a vessel took the ground in going up the river at *Cork*, in the ordinary course of navigation, and was damaged, it was not a stranding; but that was because the accident happened in the ordinary course of the voyage, and upon that principle the Court distinguished that case from *Carruthers v. Sydebotham (e)*. There a ship, being under conduct of a pilot, in her course up the river to *Liverpool*, was, against the advice of the master, fastened at the pier of a dock basin by a rope to the shore, and left there, and she took the ground, and when the tide left her fell over on her side and bilged, in consequence of which when the tide rose she filled with water, and the goods were damaged; and that was held to be a stranding, because the ship had been improperly taken out of her ordinary course. The same distinction was recognised in *Rayner v. Godmond (f)*, where *Bayley, J.*, said those two cases were reconciled,

(a) 7 T. R. 210.

(b) 3 Camp. 429.


(c) Marsh. Ins. 231.

(d) 4 J. B. Moore, 15.

1 B. & B. 388, S. C.

(e) 4 M. & S. 77.

(f) 5 B. & A. 225.

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and that the true construction was, "that where in the ordinary course of the voyage the ship must go on the strand, the underwriter is exempt; but where it arises from an accident, and out of the ordinary course, he is liable." The only case at all opposed to this current of authorities, is that of *Baring v. Henkle* (a), where it was decided that where a ship in the river *Thames* was run foul of by two other vessels, and being thereby driven aground remained fast for an hour, it was not a stranding; but the law of that case is very questionable, and, besides, it differs from the present, because here the stranding was resorted to as the only means of preventing the total loss of the ship.

F. Pollock, contra. The vessel, in this case, was not stranded within the meaning of the policy. That which is called a stranding here, was, in fact, a mere removal of the ship from one part of the harbour to another. In *Caruthers v. Sydebotham*, and *Rayner v. Godmond*, the damage to the goods was caused by the stranding. [*Littledale, J.* That would make no difference in point of law]. The rule of construction laid down in those cases seems somewhat narrow in principle; and even adopting that rule, *Baring v. Henkle* is an authority in favour of the present defendant, for there the vessel was not in the course of her voyage when she was driven aground, and yet it was held that she was not stranded. Here the damage done to the goods was occasioned by the ship striking upon the fluke of an anchor—after that she was moored in deep water; and the subsequent act of hauling her upon the shore was one totally unconnected with the ordinary course and purposes of the voyage, and for which the insurer should not be held responsible.

ABBOTT, C. J.—I am clearly of opinion that this was a stranding within the meaning of the policy. The distinction taken in the cases cited on the part of the plaintiff

(a) Marsh: Ins. 240, 2d ed.

appears to me both sound and reasonable, and I think it applies most forcibly to the present case. For, what are the facts here? The ship is driven into a harbour by stress of weather. In going into the harbour she meets with an accident, and is no sooner moored in deep water than she is found to be in a sinking state. To prevent her from sinking she is removed to another part of the harbour, where she immediately takes the ground, and remains fast upon it for half an hour. I confess I do not know how to distinguish such a case from the case of a ship at sea, which being leaky and in danger of sinking in a storm, is allowed to drive upon the beach of the main ocean as the only means of preventing her total destruction. It seems to me, therefore, that this case is within the principle of *Burnett v. Kensington*, and that the plaintiffs are entitled to recover.

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The other judges concurred.

Judgment for the plaintiff.

THOMAS SNELL v. JOHN SNELL and ROBERT HEARD.

Tuesday,
 November 22d.

COVENANT for not delivering sufficient timber for the repairs of certain premises situate in the parish of *Beaford*, in the county of *Devon*. At the trial, before *Abbott*, C. J., at the *Devonshire* summer assizes, 1824, the plaintiff obtained a verdict, damages 3000*l.*, subject to the award of an arbitrator, and subject to the opinion of this Court, upon the following case:—

Declaration
 on a covenant
 in a lease to
 deliver timber,
 growing on
 the demised
 premises, suf-
 ficient for the
 repairs there-
 of; averring,
 that there was
 timber grow-
 ing on the

Jonathan Ivie, by a certain indenture of lease, dated premises sufficient for the repairs, but that defendant did not deliver it. Defendant set out the lease upon oyer, and pleaded, first, non est factum; and second, that there was not timber growing on the premises sufficient and proper for the repairs. Issue on both pleas:—Held, first, that the only question upon the first issue was, whether the defendant had executed the lease as set out; for the lease, so set out, became part of the declaration, and its legal effect could not be questioned except upon demurrer. Held, second, that the second plea was good, although it did not allege that there was not timber growing on the premises sufficient for the repairs, or any part thereof.

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10th April, 1775, and made between the said *J. I.* of the one part, and one *Anthony Snell*, of the other part, demised for the term of 99 years then next ensuing, certain messuages, gardens, &c., and all those two water-grist-mills and mill-houses, with the appurtenances, called *Beaford Mills*, together with all those head-wears, mill-pools, &c.; and also all that coppice known by the name of *Beaford Wood*, with the appurtenances, (excepting unto the said *J. I.*, his heirs and assigns, all timber and timber-like trees, and saplings of oak, ash, elm, and beech, then growing, or thereafter to grow on the said premises, or any part thereof, with free liberty of ingress and egress for the said *J. I.*, his heirs and assigns, agents, workmen, and servants, at all times, to view, fell, work up, and carry away the same, during the term thereby granted); and the said wood, called *Beaford Wood*, to be kept for wood and timber as formerly, except two acres to be grubbed up, and certain parts in the occupation of *William Heard*. And the said *A. S.* did, by the said lease, for himself, his executors, &c., covenant, promise, and grant, to and with the said *J. I.*, his heirs and assigns, that he the said *A. S.*, his executors, &c., should and would, at his and their own proper costs and charges, repair and amend, and keep in good and sufficient repair, as well the said mills, mill-houses, flood-hatches, mill-leats, and head-wears, so as the two water-grist-mills, mill-house, mill-leat, and head-wears, and all other things belonging to them, might be kept as large, strong, and useful in every respect, as they at any time had formerly been; and being so kept in good and sufficient repair, he the said *A. S.*, his executors, &c., should and would likewise, at his and their own proper costs and charges, well and sufficiently uphold, sustain, and maintain all and singular the said demised premises, with the appurtenances, as well houses, walls, and coverings, as the said two mills and wears, and all hedges, ditches, gates, bars, stiles, and fences, with all needful and necessary reparations and amendments whatsoever, when

and as often as need should require, during the said term, and the same mills, wears, leat, hatches, and all other the premises, with the appurtenances, so well and sufficiently repaired, sustained, upholden, maintained, and amended, at the end of the said term, should and would leave and yield up the same, *the said A. S., his executors, administrators, and assigns, having and taking, by delivery of the said J. I., his heirs or assigns, steward or agent, sufficient timber growing on the premises for repairing the said messuages, tenements, mills, and premises, during the said term.* In pursuance of the said lease, A. S. entered upon and took possession of the demised premises. The plaintiff is assignee of the leases, and is in possession of the demised premises. The defendants are the assignees of the reversion. The demised premises requiring repair, the plaintiff demanded of the defendants sufficient timber, growing on the premises, to be delivered to him for repairing; and the defendants having neglected to furnish the same, the plaintiff brought his action to recover in damages for breach of covenant under the circumstances. The declaration stated, that *Jonathan Ivie*, by indenture of 10th April, 1775, did demise to *Anthony Snell*, certain messuages, tenements, mills, and premises, (except as in the said indenture excepted), and that the said A. S. did, in and by the said indenture, for himself, his executors, &c., covenant, promise, and grant, to and with the said *J. I.*, his heirs and assigns, that he the said A. S., his executors, &c., should and would, at his and their own proper costs and charges, repair and amend, and keep in good and sufficient repair, the said messuages, tenements, mills, and premises; and being so kept in good and sufficient repair, he, his executors, &c., should and would likewise, at his and their own proper costs and charges, well and sufficiently uphold, sustain, and maintain the said messuages, tenements, mills, and premises. And the said *I. S.* did, in and by the said indenture, for himself, his heirs and assigns, covenant, promise, and agree to and with the said

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A. S., his executors, &c., that he the said *J. I.*, his heirs or assigns, steward or agent, would deliver sufficient timber, growing on the premises, to repair the said messuages, tenements, mills, and premises, during the said term. Subsequently having stated a demand and request that the said defendants would deliver sufficient timber, growing on the demised premises, for completing the repairs; the declaration averred notice given to the defendants, that he, the plaintiff, was ready and willing, and that it was his intention to do and complete such repairs, so soon as timber should be delivered to him for that purpose; and averred, that timber sufficient for such repairs was growing on the demised premises. The defendant, after craving oyer and setting out the indenture, pleaded, first, non est factum; and, secondly, that the timber growing on the demised premises was not proper or sufficient to repair them, as stated in the declaration; on which pleas issues were joined: and at the trial the plaintiff's counsel contended that the defendants, by setting out the deed on oyer, and pleading non est factum, admitted the words of the deed, "the said *A. S.*, his executors, &c., having and taking by delivery of the said *J. I.*, his heirs or assigns, steward or agent, sufficient timber, growing on the demised premises, for repairing the said messuages, tenements, mills, and premises, during the said term," to amount to a covenant; and that the defendants, on such pleading, were entitled to object only any variance (if any) between the covenant set out in the declaration, and the covenant admitted by the defendant's pleading to be contained in the indenture of lease; and also that the plea of the defendants, that the timber growing on the demised premises was not sufficient to repair them, admitted the fact that there was timber growing on the demised premises; and as no kind of timber was excepted by the indenture, that all timber was proper; and that on those issues the plaintiff must have a verdict, the quantum of damages on those issues being the only fact to be ascertained. On the other

hand, the counsel for the defendants contended, that those words in the lease did not amount to any covenant on the part of the lessor to provide timber for the repairs ; and, if not, that the defendants were entitled to a verdict on their plea of non est factum ; and, however that might be, they were entitled to contend on that plea, that the lease was not correctly set out in the declaration, inasmuch as the declaration represented the stipulation on the part of the lessor as an absolute and independent covenant, and not as a mutual condition or covenant, to be performed at the same time with that of the lessee ; and it appeared by the declaration, that the lessor was to deliver timber growing on the demised premises generally ; but by the lease, although the whole of *Beaford Wood* was demised, two acres of it were to be grubbed up, and the rest of the wood only kept for timber, as formerly. The defendants' counsel also contended, that even if there were some timber growing on the demised premises, yet if it was not proper or sufficient for the requisite repairs, the defendants would be entitled to a verdict on the other issue. Whereupon these questions of law were agreed to be made the subject of a special case, and the questions of fact (subject to the opinion of the Court upon the law) and damages thereupon were referred to arbitration. The questions for the opinion of the Court are, first, whether the words, " the said A. S., his executors, &c., having and taking, by delivery of the said J. I., his heirs or assigns, steward or agent, sufficient timber, growing on the demised premises, for repairing the said messuages, &c., during the said term," amount to a covenant on the part of the lessor, or only to a condition or qualification of the lessee's covenant to repair ; and whether, in the latter case, the defendants were or were not entitled to a verdict on their plea of non est factum, on that ground. Second, whether the indenture was correctly set out in the declaration ; and, if not, whether the defendants were or were not entitled to a verdict on that plea, on that ground. And, third, whether the defendants

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were or were not entitled to a verdict on the other issue, in case the arbitrator should find that there was some timber growing on the demised premises, but that the same was not proper or sufficient for the repairs.

Carter, for the plaintiff. The first two questions, which respect the construction of the supposed covenant, do not arise upon the record as now framed, and cannot be entertained by the Court, because the defendants have cravedoyer and set out the deed, and then pleaded non est factum, which they cannot properly do. [*Abbott*, C. J. The defendants certainly ought not to set out the deed uponoyer, and plead non est factum, if they intend to question the legal effect of the deed. The deed, when so set out, becomes part of the declaration, and if its validity is meant to be questioned, the proper course is to demur]. Then with respect to the third question, the plaintiff is clearly entitled to a verdict upon the second issue. The declaration avers that there was timber growing on the premises sufficient for the repairs. The plea alleges that the timber growing on the premises was not proper or sufficient to repair them; but as it does not add, *or any part thereof*, it is in effect an admission that there was timber growing on the premises which was applicable to the repairs; and as the word *proper* is not to be found in the deed, the plaintiff must at all events have a verdict on that issue, and all that remains for the arbitrator to do, is to assess the damages.

E. Lawes, for the defendants. Looking at the deed as set out onoyer, it certainly contains no covenant by the lessor to deliver timber. [*Abbott*, C. J. Then you should have demurred to the declaration]. There clearly is a variance between the declaration and the deed, and the defendants are entitled to the benefit of that on non est factum. The covenant is to repair during the term, and to deliver up the premises so repaired at the end of the term,

“the said A. S., his executors, &c., having and taking by delivery of the said J. I., his heirs or assigns, steward or agent, sufficient timber, growing on the demised premises, for repairing the said messuages,” &c. It is impossible to say that this is a covenant by the lessor; it is a mere condition or qualification appended to the covenant by the lessee. For this construction, there are many and grave authorities. In *Holder v. Tayloe*(a), it was decided that “If a lessee covenants to repair, provided always that the lessor shall find great timber, that proviso shall not be any covenant on the part of the lessor, but shall be only a qualification of the covenant of the lessee.” The same principle will be found laid down repeatedly by Lord Coke, particularly in Lord *Cromwell’s* case(b), in *Nokes’s* case(c), and in his *Commentary*(d). Again, in *Dyer*, 19, b. pl. 115, there is a case which shews clearly that the lessee in this case might by virtue of the lease have taken the timber without a delivery by the lessor; and besides, it is difficult to imagine how the lessor could enter for the purpose of delivering it, without being guilty of a trespass. Then, if, as seems clear upon all the authorities, the words set out in the declaration do not amount to a covenant, there is a fatal variance between the declaration and the deed; and *Howell v. Richards*(e), *Waugh v. Bassell*(f), and *Ross v. Parker*(g), are all authorities to shew that the defendants are entitled to take advantage of that variance upon the plea of non est factum. [Abbott, C. J. The language of Gibbs, C. J., in *Waugh v. Bassell*, is decidedly against you, for he says, “after oyer and non est factum pleaded, the question is, whether the tenor set out is the same as the tenor of the bond executed;” and the same inference is clearly deducible from the decision in *Ross v. Parker*]. At any rate the covenant in the deed, if it

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(a) Rol. Abr. Covenant (C), 3.

(b) 2 Rep. 69 b.

(c) 4 Rep. 80 b.

(d) Co. Litt. 384 a.

(e) 11 East, 633.

(f) 5 Taunt. 707. 1 Marsh. 214, S. C.

(g) Ante, vol. ii. 662. 1 B. & C. 358, S. C. Vide Tidd. 630, 8th ed.


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deserve that name at all, is a mutual and dependent covenant; but the declaration describes it as an absolute and independent covenant, and therefore, in the words of Lord *Ellenborough*, in *Tempny v. Burnard*(a), the defendant is entitled to take advantage of the variance on non est factum.

ABBOTT, C. J.—I shall express no opinion upon the question of the construction of this deed in point of law, namely, whether it contains a covenant by the lessor to furnish timber for the repairs of the premises, or not; indeed, framed as these pleadings are, that question is not properly before the Court. The declaration alleges that there is such a covenant in the lease: and the defendant cravesoyer, sets out the lease, and pleads non est factum. The effect of such a course of proceeding, according to all the authorities, is, that the only question to be tried is, whether the deed so set out upon the record, and so made part of the declaration, has or has not been executed by the defendant; for if it has, the plaintiff is entitled to a verdict on that issue. But the defendant has pleaded a second plea, upon which another question arises. That plea is certainly informal; it ought to have alleged that there was not timber growing on the demised premises sufficient for the repairs, *or any part thereof*. The plaintiff, however, has not demurred, therefore the plea must be taken as it stands, and under such circumstances may perhaps be good. The plea contains the word *proper*, but it does not appear to me that any thing turns upon that, for the word *sufficient* embodies the word *proper*, and applies to quality as well as quantity; and in order to be within the covenant the timber should be sufficient in both those respects. At the trial no evidence was adduced, nor indeed any question made upon this point; it was agreed to refer it to an arbitrator; and our only duty is to direct him what course he is to pursue. It seems to me that his

(a) 4 Camp. 20.

course must be this. If he finds that there was timber growing on the premises sufficient for all the repairs, he will award damages accordingly. If he finds that there was timber sufficient for some of the repairs only, he will award damages in that proportion. And if he finds that there was no timber at all, of a kind applicable to the repairs, he will award a verdict to be entered for the defendants on that issue. If the defendants should not be satisfied with the construction put upon the covenant by the plaintiff, they have still their remedy; for they may bring a writ of error.

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BAYLEY, J.—I entirely concur in the view taken of this case by my Lord Chief Justice. The first question is, what is in issue here upon the plea of non est factum. Instead of pleading that plea, the defendant ought to have demurred. I take it to be quite clear that when a defendant sets out the deed declared upon on oyer, he cannot take the benefit of a variance between the deed and the declaration, on a plea of non est factum; he must demur. In this case, therefore, the question is not, what is the legal operation of the lease, but, whether it was executed by the defendant as set out by himself; that is the only issue, and that has been properly found for the plaintiff. In the present state of the record the defendant has corrected the plaintiff's mis-statement of the deed; and therefore he has waived the benefit of objecting that mis-statement. The language of Lord Chief Justice *Gibbs* in *Waugh v. Bussell* is quite decisive upon this point, and is undoubtedly good law. With respect to the second question, it is clear that the special plea is informal. It certainly ought to have stated that the timber growing on the demised premises was not sufficient for any part of the repairs. But as the plaintiff has not demurred to that plea, the arbitrator must take all the facts into his consideration, and decide as well as he can according to the justice of the case. The ver-

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dict must be for the plaintiff on the first issue, and the arbitrator must say how it shall be entered on the second issue.

HOLROYD, J., and LITLEDALE, J., concurred.

Judgment for the plaintiff.

Wednesday,
November 23.

SARJANT v. GORDON.

In cases of non-bailable process, if the defendant's name is misstated in the writ, the Court will not set aside the writ and proceedings on motion, but will leave the defendant to his plea in abatement.

LEE moved for a rule to shew cause why the bill of *Middlesex* sued out in this case, and all subsequent proceedings had thereon, should not be set aside for irregularity. The irregularity was, that the defendant was described in the writ as "*John K. Gordon*," whereas his real names were *John Richardson Gordon*. In support of his application he cited *Tomlin v. Preston* (a), where *Abbott, C. J.*, was reported to have said, "There is no difference between serviceable and bailable process upon questions of regularity. The Court invariably requires that its process shall be conducted with regularity and propriety, and the *Christian* names of the parties must be inserted even in a serviceable writ."

BAYLEY, J. (the only judge in Court).—It has been determined by the Court since that case, in two or three instances, I think within the last two or three terms, that they will not interfere in a summary mode in cases of non-bailable process, but will leave the party to his plea in abatement; and that is in my opinion a proper rule.

Rule refused.

(a) 1 Chit. Rep. 398.

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Thursday,
November 24.

GANDELL v. ROGIER.

THE defendant having brought a writ of error on a judgment of *C. P.*, a motion was made by the plaintiff to set aside proceedings, and the affidavits being entitled in the cause in the court below, and not in error, it was objected that they could not be read.

Affidavits in a court of error must be entitled in the cause above and not below.

The COURT thought the objection fatal, and refused to allow the affidavits to be read.

Rule discharged.

Curwood for the defendant in error, and *Reuder* for the plaintiff in error.


 GILMOUR v. BRINDLEY.

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THE defendant having been arrested, applied to an attorney whom he had not employed before, to put in bail for him. The attorney accordingly gave a bail-bond to the sheriff, and afterwards called upon the plaintiff's attorney and proposed on behalf of the defendant, terms for the settlement of the debt. The terms proposed being rejected, the attorney at the return of the writ put in bail above, to which the plaintiff's attorney excepted; but the bail not justifying in time, an attachment was issued against the sheriff. Immediately after the bail-bond had been given, the defendant consulted another attorney, whom he was in the habit of employing, and that attorney also gave notice to the plaintiff of bail having been put in for the defendant, and signed himself "attorney for the defendant." The plaintiff's attorney not knowing the second attorney,

A defendant being arrested, employed on the sudden one attorney to put in bail for him, and another to carry on the subsequent proceedings. At the return of the writ each attorney gave notice of bail above, describing himself as the defendant's attorney. The plaintiff excepts to one set of bail, and that set not justifying, he attaches the

sheriff, without regarding the notice of bail given by the second attorney:—Held, that he was bound to attend to both notices, and the attachment set aside for irregularity.

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and having had previous communication with the first only, thought there was some mistake, and taking no notice of what had been done by the second attorney, did not enter any exception to the bail of which he had given notice, and the bail justified. On a former day, *Godson* obtained a rule nisi to set aside the attachment against the sheriff for irregularity, bail having been put in and perfected in due time.

Comyn now shewed cause. This attachment is regular. Here is notice of bail from two different attornies, each of whom describes himself as attorney for the defendant. The plaintiff's attorney is not bound to attend to both. He acts upon the notice given by the gentleman whom he knows to be the defendant's attorney, and that is sufficient. Exception is regularly entered to the bail of which notice is first given, and they not having justified in time the attachment is regular. Suppose half a dozen attornies severally give notice of bail, each describing himself to be the defendant's attorney, is the plaintiff's attorney bound to attend to them all?

Godson, contra. There was no occasion for a rule to change the attorney before the defendant was actually in Court, and therefore the plaintiff was bound to take notice of the proceedings of the second attorney. Nothing is more common than for the sheriff or his bail to put in and justify bail above, their attornies describing themselves respectively as the *defendant's attorney*; and yet the plaintiff's attorney is bound in such cases to act upon notices so given. Here the defendant being suddenly arrested, employs the nearest attorney he can find to put in bail for him, and then he resorts to his regular attorney to do what is necessary to be done afterwards. He is therefore not to be prejudiced because the plaintiff thinks proper to recognise the first attorney only as the defendant's attorney.

BAYLEY, J., after consulting the Master, said.—The Master reports to us, that in practice it is usual for the attorney employed by the sheriff, or the bail, to put in and justify bail above, to describe himself as the *defendant's attorney* in the notice, though he be not actually employed by the defendant. Whether that practice ought to be corrected in future is another question, but it seems to me that the plaintiff's attorney in this case was not justified in treating the proceedings of the second attorney as a nullity, and consequently the attachment ought not to have been issued.

Rule absolute (a).

(a) See 2 Sir W. Bl. 1323. 7 Taunt. 48. 2 Marsh. 365, S. C. 1 Chit. 81. 2 B. & A. 604. 1 Chit. 329. Tidd. 90, 8th ed.

DOR dem. LUCY v. BENNETT.

EJECTMENT for premises in the county of *Cornwall*. The defendant had obtained leave to defend as landlord, and entered into a consent rule, which concluded as follows: "The plaintiff, nevertheless, is at liberty to sign judgment against the casual ejector, but execution thereon is stayed, *until this Court shall further order.*" At the last *Cornish* assizes the plaintiff had a verdict, upon which judgment was entered up, and a writ of possession sued out, *without any further order of the Court*. A rule nisi having been obtained, for setting aside the writ of possession for irregularity,

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Where *landlord* defends, and a verdict and judgment are obtained against him in ejectment, there is no necessity for any *further order* of the Court, to enable the plaintiff to sue out execution.

Marryat shewed cause. In this case the plaintiff was at liberty to take out execution, without any further order of the Court. Here the defendant appeared as the *landlord* at the trial, and that is equivalent to a further order of the Court. It is only where the landlord does not appear, that any special application to the Court is necessary to take out execution, and that is in order to prevent

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any collusion between the lessor of the plaintiff and the landlord, to the prejudice of the tenant in possession. But here there is a *verdict* against the defendant as landlord, and that dispenses with the necessity of applying for leave to take out execution.

Bale, contra, relied upon *Doe v. Gibbs* (a), as an express authority in support of the present application. There it was held, that when the landlord is admitted to defend an action of ejectment, and the judgment is entered against the casual ejector with a stay of execution, *until further order*, the lessor, before he takes out execution, must move the Court for leave to do so. Such an application seems but reasonable, lest the defendant should be taken by surprise, as he might shew some ground why the execution should not issue.

BAYLEY, J.(b).—I see that in *Impey's Practice*, it is laid down generally, that although there is a verdict against the landlord, there must still be an application to the Court for leave to take out execution. As this is a question of considerable importance, it is desirable that we should ascertain what the practice of the other Courts is, before we give judgment.

Cur. adv. vult.

BAYLEY, J., on this day delivered the judgment of the Court.—We have considered this case. It appears that the defendant had obtained leave to defend the ejectment as landlord, and had entered into the consent-rule, by which it was ordered, that the plaintiff should be at liberty to sign judgment against the casual ejector, but that execution thereon should be stayed *until further order*. The landlord appeared at the trial, and a verdict and judgment being given against him, execution issued thereon. The

(a) 1 Chit. 47. See the cases there cited.

(b) *Abbott*, C. J., was absent.

question was, whether the execution was irregular, inas-
much as there had been no previous rule, or further order
of this Court, directing that such execution should issue.
Now the only reason why such an order should previously
have been made, would be to prevent collusion between
the landlord and the lessor of the plaintiff, to the prejudice
of the tenant in possession; but except on that ground,
there can be no reason for such further order. If there
was any collusion, it might afford ground for a distinct
application, in order that the tenant might be released
from the judgment and execution, which is sued out
against the landlord. I take it, that the condition that
execution shall be stayed until "further order," means
nothing more than this; that the plaintiff shall not act
upon the judgment against the casual ejector, until there
is some further order for that purpose. If the landlord
does not appear, to confess lease, entry, and ouster, at the
time of the trial, then there must be an application to the
Court for leave to sue out a writ of possession; judgment
against the casual ejector, not being sufficient for that
purpose as against the landlord. But when the landlord
himself defends, and there is a verdict against him, of
course there follows a judgment thereon, and the plaintiff
has no occasion to avail himself in any respect of the judg-
ment against the casual ejector, and therefore there is no
necessity whatever for any further order to warrant the
issuing of a writ of possession. Upon inquiring of the
officers of the Court as to the practice, I find, that
although in some instances parties do take out such an
order, yet there are many in which they wholly omit so to
do; and that brings in question the necessity of it. I was
desirous of ascertaining what the practice had been in the
Common Pleas upon the subject, in order that, if possible,
the practice of both Courts might be uniform; and there-
fore I have applied to the judges of that Court, and from
them I learn, that they are not aware, under such circum-
stances as this case presents, that it is at all necessary
there should be any further order or rule to warrant the

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issuing of execution, and they represent to me, that it is the opinion of the officers of that Court, that such an order is not necessary. Upon looking at the books of practice, it appears that such orders have been made, but they have always been absolute in the first instance. If that be so, then it would not, in any respect, be beneficial to the party, for it is not probable that he would be present to resist such an order, unless he had ground for supposing that there had been collusion between the lessor of the plaintiff and the landlord. If such collusion existed, it might be the ground of an original motion for staying execution. For these reasons we are of opinion, upon consideration, that the proceeding to execution in this case was well justified, without any further order of the Court for the purpose.

Rule discharged.

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November 24.

Exception
must be entered to bail,
before the
body-rule can
be served on
the sheriff.

The KING v. The SHERIFFS of MIDDLESEX, in the cause
of ALEXANDER v. —.

ON shewing cause against a rule nisi for setting aside an attachment against the sheriff for not bringing in the body, it was objected that before serving the body-rule, the plaintiff's attorney had not entered an exception to the bail put in for the defendant, and consequently that the sheriff was not liable to be attached for not bringing in the body.

BAYLEY, J.—The practice certainly is, that you must enter an exception to the bail, before you can serve the body-rule.

HOLROYD, J., and LITLEDALE, J., concurred.

Rule absolute, for setting aside the attachment.

Comyn, for the plaintiff; Archbold, for the defendant.

HIPPLESLEY v. LAYNG.

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ASSUMPSIT for work and labour, and upon an account stated. Plea, the general issue. At the *Summer* assizes for *Somersetshire*, 1824, this, and another cause of *Layng v. Welsh*, and all matters in difference between the parties, were referred to a gentleman at the bar, and the costs of the causes were to abide the event. On the 25th *February* last the arbitrator made his award, and thereby found that 10*l.* only was due to the plaintiff. On the 5th *May* the defendant's attorney gave the following written undertaking to the plaintiff's attorney:—"I undertake that the costs of the two actions shall be paid as soon as the bills are delivered and the accounts are settled." In *Trinity* term last, a rule nisi was obtained to enter a suggestion to deprive the plaintiff of his costs in this cause, on the ground that the defendant ought to have been sued in the Court of Requests for the City of *Bath*, under the 45 *Geo. 3*, c. 67, s. 16, which gives the commissioners therein named jurisdiction to decide and determine all disputes and differences between party and party, for any sum not exceeding 10*l.* Inasmuch as the arbitrator had awarded only 10*l.*, and the defendant resided within the city of *Bath*, it was contended that the plaintiff had no right to costs by the 47th section of the statute.


A party entitled to enter a suggestion for the purpose of depriving a plaintiff of his costs under a Court of Requests' act, must apply promptly, and it is not sufficient that he applies before final judgment is signed.

Where a defendant might have applied in *Easter* term, for such a purpose, but suffered all that term to elapse, and did not apply till *Trinity* term:—Held, that he came too late.

Erskine now shewed cause, and contended, first, that the sum having been awarded by an arbitrator, the case was not within the statute; and second, that at all events this application came too late. Upon this latter point he was stopped by the Court.

Marryat, in support of the rule (*a*), urged that this

(*a*) There was a doubt raised on the affidavits, whether in point of fact the defendant resided within the jurisdiction of the *Bath* Court of Requests, but upon this point the case did not turn. See *Aron v. Dallimore*, ante, vol. iii. 51. *Keene v. Deeble*, ante, vol. v. 383, 3 B. & C. 491, S. C.

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application being made before final judgment was signed, it was in sufficient time, and he cited *Watchorn v. Cook* (a), and *Calvert v. Everard* (b).


BAYLEY, J. (c).—This act of parliament applies to all persons “residing or being within the city of *Bath*, or the liberty or precincts thereof, or keeping or using any house, warehouse, wharf, quay, lodging, shop, shed, &c.” This defendant does not shew distinctly by his affidavit, that he was entitled to the privilege of being sued in the Court of Requests. My opinion, however, in this case, is not founded on that circumstance. I think that a party who seeks to deprive a plaintiff of his costs under this or other similar acts, must come *promptly* to the Court, otherwise he ought to be precluded from enjoying the benefit given him by the act of parliament. In many cases this act of parliament may be productive of great hardship to a plaintiff, for whether he does or does not know that the defendant lives in *Bath*, or occupies a warehouse there, still though he may have a good cause of action to the extent of 10*l.*, he will be deprived of those costs to which he would otherwise be entitled. It is suggested by Mr. *Marryat* that the party is in time so long as he comes to the Court before final judgment is signed; but I find no case which goes to that extent. The case of *Watchorn v. Cook*, only decides that the party is bound to come in reasonable time. There the party did not come until after final judgment was signed, and the Court held that he came too late; and *Calvert v. Everard* only decides that the party is bound to come before final judgment; but it does not say that *at all events* the party is in time, if he comes before final judgment. I think that a defendant seeking a privilege of this description ought to come *promptly*, and if he suffers a length of time to elapse before he applies to the Court, it is a waiver of his right. Here

(a) 2 M. & S. 348.

(b) 5 Id. 510.

(c) *Abbott*, C. J., and *Holroyd*, J., were absent.

the award was made on the 25th of *February*, 1825. That communicates to the defendant that there is to be a verdict for 10*l.* only entered. The defendant therefore was entitled to apply to the Court, to enter a suggestion as soon as ever *Easter* term commenced; but he does not avail himself of that opportunity. He suffers the plaintiff's attorney to incur expense in preparing bills of costs, and taking the ordinary remedies to obtain payment. The whole of *Easter* term elapses, and it is not until some time in *Trinity* term, that the present application is made. But the case does not stand merely on that, for about the 5th *May*, the defendant's attorney deliberately signs this undertaking: "I undertake that the costs of the two actions shall be paid as soon as the bills are delivered and the accounts are settled." This undertaking induces the plaintiff's attorney to make out his bill of costs, and incur further expense, and therefore I think that after a party has deliberately signed such an engagement, all right to make such an application as the present is gone.

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LITLEDAL, J., concurred.

Rule discharged.

The KING v. THOMAS WESTWOOD.

Friday,
November 25.

QUO warranto information against the defendant, for usurping the office of burgess of the borough of *Chepping Wycombe*, in the county of *Buckingham*. Pleas; first, that the said borough from time immemorial hath been an

No charter granted to a corporation by the crown, can be *partially* accepted.

Every corporation has a power to make bye laws, incident to the whole body; therefore, where a charter gives to a select body a power to make bye laws in certain cases specified therein, the incidental power of the whole body to make bye laws in other cases is not taken away.

A corporation consisted of mayor, bailiffs, aldermen, and burgesses. The bailiffs and aldermen formed a common council, and were chosen out of the burgesses. The charter vested the right of electing burgesses in the mayor and burgesses. The corporation made a bye law, vesting the right of electing burgesses in the mayor and common council:—Held, per *Hobroyd* and *Littledale, J.'s*, *Bayley, J.*, dissentiente, *Abbott, C. J.*, dubitante, that the bye law was good.

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ancient borough; that within the said borough, during all that time, there have been a mayor, two bailiffs, and an indefinite number of burgesses; of which burgesses there have been twelve, sometimes called 'principal burgesses, sometimes capital burgesses, and for 150 years past called aldermen; who, together with the bailiffs, have been the common council of the borough, aiding and assisting to the mayor; that from time immemorial there hath been an ancient and laudable custom within the borough, that the mayor and common council for the time being, or the major part of them, duly assembled together for that purpose, within the borough, have from time to time, by themselves, and without the concurrence or assistance of the rest of the burgesses, nominated and elected such person or persons to be a burgess or burgesses of the said borough, as to them the said mayor, and common council for the time being, or the major part of them, so assembled, hath seemed meet; and that defendant was duly elected a burgess according to that custom. Second plea, like the first, only omitting the description of the burgesses, and stating that there ought to be, and was within the borough, an indefinite number of burgesses of the said borough, and also a common council. Third plea, that the said borough from time immemorial hath been an ancient borough, and that the burgesses of the said borough, long before, and at the time of granting the letters patent thereafter mentioned, were a body politic and corporate, called and known by the name of the mayor, bailiffs, and burgesses of the borough; that within the said borough, from time immemorial, there hath been an indefinite number of burgesses; that on the 16th *November*, in the 15th year of the late king *Charles 2d*, he the said late king, by his letters patent, did, for himself, his heirs and successors, grant, ordain, constitute, and confirm to the said mayor, bailiffs, and burgesses, that from thenceforth for ever there should be one mayor, two bailiffs, and twelve honest and discreet men, continually inhabiting and residing within the borough,

who should be, and be called aldermen ; *and that the mayor, bailiffs, and burgesses of the borough, and their successors, or the major part of them, from time to time for ever, should and might be able to elect so many, and such other men, inhabiting or not inhabiting within the borough, as, and which to them should seem most expedient, to be burgesses of the borough;* and the said late king further willed, and thereby for himself, &c., did grant and confirm to the said mayor, bailiffs, and burgesses of the said borough, and their successors, that the said aldermen and bailiffs of the said borough, and their successors, should be, and be called the common council of the said borough, and should be from time to time assisting and aiding to the mayor of the said borough for the time being, in all matters and causes touching and concerning the said borough ; and the said late king further willed, and did thereby for himself, &c., grant and confirm to the said mayor, bailiffs, and burgesses of the said borough, and their successors, that the mayor, aldermen, and bailiffs of the said borough, and their successors, for the time being, or the major part of them, (of whom the mayor for the time being the said late king willed to be one), might, and should have full power and authority to frame, constitute, ordain, and make, from time to time, such reasonable laws, statutes, and ordinances whatsoever, as to them should seem to be good, wholesome, useful, honest, and necessary, according to their sound discretions, for the good rule and government of the burgesses, artificers, and inhabitants of the said borough for the time being, and for declaring in what manner and order the said mayor, aldermen, bailiffs, and burgesses, and the artificers, inhabitants, and residents of the said borough, should behave, conduct, and carry themselves in their offices, mysteries, and business, within the said borough, and the limits thereof for the time being, and otherwise for the public good, and public advantage, and rule of the said borough, and the victualling of the said borough, and also for the better preservation, government, disposition, letting

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and demising of lands, tenements, possessions, revenues and hereditaments, to the said mayor, bailiffs, and burgesses, and their successors, by the said letters patent, or otherwise, given, granted, assigned, or confirmed, or thereafter to be given, granted, or assigned, and other matters and causes whatsoever touching, or in any wise concerning the said borough, or the state, right, and interest of the said borough: and the said late king did thereby constitute and appoint one person named therein to be the first and present mayor of the borough, two other persons named therein to be the first and present bailiffs of the borough, and twelve other persons named therein to be the twelve first and present aldermen of the borough: and the said late king, by his said letters patent, for himself, &c., further granted and confirmed, that the said mayor, aldermen, bailiffs, and burgesses of the said borough, for the time being, or the major part of them, from time to time, for ever thereafter, might and should have power and authority, yearly and every year, on the *Thursday* next before the feast of *St. Michael* the archangel, to assemble themselves, or the major part of them, in the Guildhall of the said borough, or in any other convenient place within the borough, to be limited and assigned according to their discretions, and there to continue until they, or the major part of them, there then assembled, should then elect and nominate one of the aldermen of the said borough, to be mayor of the said borough, for one whole year then next ensuing, and that then and there they should and might be able to elect and nominate, before they should thence depart, one of the aldermen of the said borough for the time being, who should be mayor of the said borough for one whole year then next ensuing; and that he, after he should be so as aforesaid elected and nominated to be mayor of the said borough, before he should be admitted to execute the same office, should take a corporal oath upon the holy gospel of God, yearly on the day of election, if he should be then present, and if he should be absent, then within one

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month next ensuing after the said day of election, before the mayor, his last successor, or, in his absence, before such aldermen of the said borough for the time being, and the rest of the burgesses of the said borough who should be then present in the Guildhall of the said borough, or in any other convenient place within the said borough, to be limited and assigned according to their discretions, rightly, well, and faithfully to execute the same office in all things touching the same office; and the said late king, by his said letters patent, for himself, &c., further granted and confirmed to the said mayor, bailiffs, and burgesses of the said borough, and their successors, that the mayor, aldermen, and bailiffs of the said borough, for the time being, or the major part of them, from time to time, for ever thereafter, might and should have power and authority, yearly and every year, on the *Thursday* next before the feast of the annunciation of the blessed virgin *Mary*, to assemble themselves, or the major part of them, in the Guildhall of the said borough, or in any other convenient place within the said borough, to be limited and assigned according to their discretion, and there to continue until they, or the major part of them there then assembled, should elect and nominate two burgesses of the said borough, to be bailiffs of the said borough, to be elected and nominated in form following; that they should and might be able there to elect and nominate before they should thence depart, two of the aforesaid burgesses, who from thenceforth should be bailiffs of the said borough for one whole year from thence next ensuing; and that they, after they should be so as aforesaid elected and nominated to be bailiffs of the said borough, before they should be admitted to execute the same office, and each of them, should take a corporal oath upon the holy gospel of God, yearly on the same day of election if they should be present, and if they should be absent, then within one month next ensuing the day of election, before the mayor of the said borough, or in his absence, before the bailiffs, their last successors, or either of

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them, in the presence of such of the said aldermen of the said borough for the time being, and the rest of the burgesses of the said borough who should be then present, in the Guildhall of the said borough, or in any other convenient place within the said borough, to be limited and assigned according to their discretion, rightly, well, and faithfully to execute the same office of bailiffs of the said borough, in all things touching the same office; and the said late king, by his said letters patent, for himself, &c., further granted to the said mayor, bailiffs, and burgesses of the said borough, that if any or either of the aldermen of the said borough should die, or be removed from his said office, (which said alderman, and every or any of them, not well behaving themselves in the same office, the said late king willed to be removeable at the pleasure of the mayor of the said borough, and the major part of the said aldermen of the said borough for the time being), that then the mayor, and such of the residue of the aldermen of the said borough who should be assembled in the Guildhall of the said borough, or in any other convenient place within the said borough, to be limited and assigned according to their discretions, or the major part of them so assembled, at the pleasure of the mayor, and the residue of the aldermen of the said borough, should and might be able to elect and prefer one or more of the best and most honest burgesses of the said borough, in the place or places of the said alderman or aldermen of the said borough, so dead, or removed from his or their office or offices, to supply the aforesaid number of twelve aldermen of the said borough; as by the said letters patent now remaining of record in the High Court of Chancery of our lord the now king at *Westminster*, will, among other things, more fully and at large appear; which said letters patent, afterwards, to wit, on the 17th *November*, in 15th *Charles 2d*, were duly accepted by the then mayor, bailiffs, and burgesses of the said borough; that afterwards, and after the granting and acceptance of the said letters patent, and long before the days and times

in the said information mentioned, to wit, on the 1st *December*, 1675, the then mayor, bailiffs, and burgesses of the said borough being in due manner met and assembled for that purpose within the said borough, did then and there duly make, constitute, ordain, and establish a certain ordinance or bye law, (not now extant in writing), for the better rule and government of the said borough, touching and concerning the election of the burgesses of the said borough, for the time then to come, in order to avoid popular confusion and disorder in such elections; by which said ordinance or bye law, it was ordained and established, that from thenceforth the mayor and common council of the said borough, or the major part of them duly assembled together for that purpose, within the said borough, should and might from time to time, and at all times thereafter, by themselves, and without the concurrence or assistance of the rest of the burgesses of the said borough, elect and chuse such person or persons to be a burgess or burgesses of the said borough, as to them the said mayor and common council of the said borough for the time being, or the major part of them, so assembled as aforesaid, should seem meet; and which said ordinance or bye law hath ever since the making thereof hitherto, been constantly kept and observed by the said mayor, bailiffs, and burgesses of the said borough, and is still in full force and virtue, and in no wise annulled, abrogated, abolished, revoked, or repealed; and that defendant was duly elected a burgess according to that bye law. General replications taking issue severally on all the facts stated in the pleas; special replication to the first and second pleas, setting out the charter of the 15th *Car.* 2, by which it was granted, ordained, and confirmed, that the mayor, bailiffs, and burgesses, and their successors, or the major part of them, from time to time, for ever, should and might be able to elect so many, and such other men, inhabiting or not inhabiting within the borough, as and which to them should seem most expedient to be burgesses of the borough.

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And the said coroner and attorney of our said lord the king, for our said lord the king, further saith, that under and by virtue of the said letters patent, the burgesses of the said borough, continually from and after the granting thereof, hitherto, have been eligible, and of right ought to have been elected, and still of right ought to be elected from time to time, by the mayor, bailiffs, and burgesses at large of the said borough, or the major part of them, and not otherwise, to wit, at, &c. And this, &c., concluding with a verification. General demurrer to the third plea. Rejoinder to the special replication to the first and second pleas, "that the said letters patent were not duly accepted by the then mayor, bailiffs, and burgesses of the said borough, as to that part thereof whereby the said late king did will and ordain, that the mayor, bailiffs, and burgesses of the same borough, and their successors, or the major part of them, from time to time, for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the said borough, as and which to them should seem most expedient, to be burgesses of the said borough; as by the said replication is above supposed," &c. Special demurrer to the rejoinder, assigning for causes of demurrer, "that defendant hath not, in or by his said last-mentioned rejoinder, stated or set forth any charter, or letters patent, or other matter of record, dispensing with a total acceptance of the said letters patent, in the said last-mentioned replication mentioned and set forth, by the mayor, bailiffs, and burgesses of the said borough, and authorizing or enabling them not to accept the said last-mentioned letters patent as to that part thereof, whereby the said late king did will and ordain that the mayor, bailiffs, and burgesses of the same borough, and their successors, or the major part of them, from time to time, for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the said borough, as and which to them should seem most expedient, to be burgesses of the said borough; and also,

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that defendant hath not, in or by his said last-mentioned rejoinder, denied, or confessed and avoided, the allegation in the said last-mentioned replication, that the said letters patent therein mentioned were duly accepted by the then mayor, bailiffs, and burgesses of the said borough; and also that defendant hath, in and by his said last-mentioned rejoinder, stated and alleged the supposed partial acceptance of the said last-mentioned letters patent, as a matter of fact, triable by the county, instead of stating and setting forth therein, as he ought to have done, the charter, letters patent, or other matter of record, if any, authorizing such supposed partial acceptance, with a prout patet per recordum, and concluding his said last-mentioned rejoinder with a verification by the record," &c. Joinder in demurrer.

*Scarlett*, in support of the demurrer. The first and second pleas are clearly bad. The question which they raise is, whether a corporation can, by law, accept a charter in part, and reject it for the residue. Upon that question no express decision has ever taken place; it must be decided, therefore, upon such dicta as can be found bearing upon it, and upon general legal principles. With respect to dicta, language very forcible in itself, and very applicable to the present case, was used by *Buller, J.*, in the course of his judgment in the case of *Rex v. Amery (a)*. Speaking of an averment of a partial acceptance of the charter there, his lordship says, "The averment proceeds on a mistake, by supposing that a charter may be accepted in part, and rejected as to the rest. The only instance in which I have ever heard it contended, that a charter could be accepted in part only is, where the king has granted two distinct things, both for the benefit of the grantees: there, I know that some have thought that the grantees may take one and reject the other. However that may be, it cannot extend to this case. This corporation must either have

(a) 1 T. R. 575.

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accepted in toto, or not at all: if they could have accepted a part only of the charter, they would have been a corporation created by themselves, and not by the king. If a charter directed that the corporation should consist of a mayor, aldermen, and 24 common councilmen, they could not accept the charter for the mayor and aldermen only, omitting the common councilmen." It is scarcely going too far to say, that his lordship there lays it down as a general rule and principle of law, that a corporation cannot accept a charter in part only, but that they must either accept, or reject it in toto. *Rex v. The Vice Chancellor of Cambridge* (a), will probably be cited on the other side as furnishing a dictum of Lord *Mansfield* equally strong the other way. His lordship there said, "There is a vast deal of difference between a new charter granted to a new corporation, (who must take it as it is given,) and a new charter given to a corporation, already in being, and acting either under a former charter, or under prescriptive usage. The latter, a corporation already existing, are not obliged to accept the new charter in toto, and to receive either all or none of it; they may act partly under it, and partly under their old charter or prescription." That observation, however, does not seem directed to any general principle, but only to the particular circumstances of the University as a very ancient and peculiar corporation, as appears by subsequent parts of Lord *Mansfield's* judgment, and by what fell from *Wilmot, J.*, in the same case: he said, "It is the concurrence and acceptance of the University that give the force to the charter of the crown. And they may take and accept the body of statutes or code of laws, separately and distinctly; they are not bound to take all, or leave all. I do not think that this superior office of high stewardship is included in this statute, which begins with specifying persons of much inferior rank; but if it had been so, we could not have overturned an usage of 240 years standing, upon words of this statute, which might


(a) 3 Burr. 1647. 1 Sir W. Bl. 547, S. C.

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seem contrary to such settled usage. It certainly did not intend to repeal the old customs and usages of the University, except in those cases where the University chose it." Then upon principle, it is quite impossible that a corporation can have the power of partially accepting a charter. All corporations, even those that are such by prescription, exist only by the authority of the crown; for prescription is merely a substitute for a charter: and if a corporation having two charters can accept part of each, and reject the rest, the result may be, that they would form a constitution for themselves perfectly different from that intended to be formed for them by the crown, and they would be, in the language of *Buller, J.*, already cited, "a corporation created by themselves and not by the king." But if a partial acceptance can ever take place, at least it must have the assent of the crown, and that assent must appear by some matter of record: at all events, therefore, the rejoinder in this case is bad in point of form, because it pleads the partial acceptance as a matter in pais triable by a jury. [*Abbott, C. J.* The argument on the other side may be, that the charter only authorised the mayor, bailiffs, and burgesses, by their corporate name, to elect burgesses; without altering or effecting the manner of the election; and if that argument is just, the custom set out in the first and second pleas may be good, notwithstanding the charter]. Undoubtedly a mere grant to the mayor, bailiffs, and burgesses, that they and their successors shall be a body corporate, carries with it the power to elect such successors, and such power would *primâ facie* vest in the body at large; but here there was an existing corporation previous to the date of the charter, and by the constitution of the original corporation the elective power was vested in the select body. If the charter was not intended to make some alteration in this respect, it would not have been necessary that it should say any thing at all respecting the election of burgesses, and it would of course have been silent on the subject; but the charter not only says that the

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mayor, bailiffs, and burgesses, shall have power to elect burgesses, but that they, *or the major part of them*, shall have that power, which clearly indicates that every integral part of the corporate body is to take a part in the election. The result, therefore, is, that an election of a burgess according to the custom set out in the first and second pleas, can only be supported by establishing two propositions; first, that the partial acceptance of the charter is good per se, and second, that it is well pleaded: in both which points the defendant must fail. Then, secondly, the third plea is equally bad with the two former, because it sets out a bye-law to which there are two fatal objections: first, that it was made by the corporation at large, whereas the charter vests the power of making bye laws exclusively in the select body; and, second, that it alters the mode of election prescribed by the charter, and excludes an integral part of the corporation from voting at the election. Where a charter in general terms empowers a corporation to make bye laws, the body at large have undoubtedly authority to make them; where a charter is entirely silent upon the subject, the same result follows; but where a charter vests that power in a select body, or limits the exercise of the power to particular specified cases, the result is totally different, *Child v. The Hudson's Bay Company*(a): and in this point of view the bye law in this case is bad. Then a bye law which alters the manner of the election as prescribed by the charter, and excludes the burgesses at large from voting at the election, has been held in many cases to be void, *Rex v. Spencer*(b), *Rex v. Cutbush*(c), *Rex v. Head*(d), *Rex v. Ginever*(e), *Rex v. Ashwell*(f), *Rex v. Bird*(g), and *Rex v. Hoblyn*(h). The last of these cases is not distinguishable in any respect from the present, and in this point of view also, the bye law in this case, therefore, is bad. The result of the whole

(a) 2 P. Wms. 207.

(b) 3 Burr. 1827.

(c) 4 Burr. 2204.

(d) 4 Burr. 2515.

(e) 6 T. R. 632.

(f) 12 East, 22.

(g) 13 East, 367.

(h) 6 Bro. P. C. 511.


therefore is, that the crown is entitled to judgment both upon the general and special demurrer.

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*Tindal*, contra. The defendant is entitled to judgment upon the whole of this record. If a new charter is granted to a pre-existing corporation, that may be partially accepted; and such an acceptance is good in law, and is well pleaded in this case; consequently the rejoinder is good, and the defendant is entitled to judgment on the special demurrer. Secondly, if the rejoinder is not good, still the replication is bad, for it furnishes no answer to the first and second pleas; because they set up a valid custom for the election of burgesses by the mayor and common council, and the replication sets up a charter which contains nothing incompatible with that custom. Thirdly, the defendant is, at all events, entitled to judgment on the general demurrer to the third plea, because that plea sets out a good bye law. First, a corporation are not necessarily bound to accept a charter at all; for it is like any other gift, and may be offered by the donor, and rejected by the donee, 2 *Bro. & Golds.* 100 (a); though, where they do accept it, such acceptance is proved by the general form of pleading, for, as Lord Coke says, "One of the best arguments, or proofs in law, is drawn from the right entries or course of pleading; for the law itself speaketh by good pleading: and therefore *Littleton* saith, 'It is proved by the pleading,' &c., as if pleading were *ipsius legis viva vox*" (b). It must be admitted, that a charter cannot be partially accepted but by the consent of the crown, for the crown has undoubtedly the power to compel a corporation to accept all or none; and in the case of a newly created corporation, a partial acceptance would be an acceptance of all, for else the corporation would be in effect making a charter for themselves. But in the case of a pre-existing corporation, a charter may, by consent of the crown, be partially accepted, and there are authorities in favour of

(a) Vide *Rex v. Pasmore*, 3 T. R. 240.

(b) Co. Litt. 115 b.

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that position antecedent to the case of *Rex v. The Vice Chancellor of Cambridge*. In *Haddock's* case (a), the Court decided, that if a corporation have franchises and privileges, by grant or prescription, and afterwards they are incorporated by another name, the newly-named body shall enjoy all the franchises and privileges which the old corporation had. *The University of Cambridge v. The Bishop of York* (b), is to the same point; and in both those cases the question was put upon the acceptance of the new charter. *Rex v. Larwood* (c), was the case of an old corporation, to which *Charles* the Second granted a new charter, altering some of their privileges; and Lord *Holt* there said, "If a corporation accept such a charter, it is good. And here is evidence of their acceptance, for the commonalty used heretofore to elect both the sheriffs, and now they elect but one of them." Then comes the case of *Rex v. The Vice Chancellor of Cambridge*, which is a direct authority in favour of the partial acceptance of a charter. The expressions of Lord *Mansfield*, and *Wilmot*, J., already cited to the Court, are decisive upon the point; and the report states, that *Yates*, J., and *Aston*, J., concurred in their opinion, and that the former "held, that an old corporation, who accept a new charter, may still act under their former charter, or under prescriptive usage." What is there unreasonable in this doctrine? If the corporation, without the consent of the crown, accept part, and reject part of the charter, the whole may be repealed by scire facias; but if the crown consent to a partial acceptance, or if it does not interfere and express its dissent from it, there is no reason why such an acceptance should not be valid. Then, the partial acceptance in this case is well pleaded. The acceptance of part is here alleged precisely in the same mode as the acceptance of the whole must have been, and there is, indeed, no other possible mode of alleging it. The acceptance of a charter is matter

(a) Sir T. Ray. 435. 1 Vent. 355, S. C.

(b) 10 Mod. 207.

(c) 1 Ld. Raym. 29.

in pais, to be proved by user, *Rex v. Larwood*; and if the acceptance of a whole charter is a fact to be tried, why should not the acceptance of part of a charter, which is equally a fact, be tried in the same manner? The acceptance can be proved only by user; there is no matter of record by which it can be proved: for no formal return can be made to a grant of a charter, as to a writ, because the charter does not direct any act to be done under seal, or by matter of record. *Rex v. Amery* does not support the argument on the other side. The dictum of *Buller, J.*, in that case, does not conflict with the decision in *Rex v. The Vice Chancellor of Cambridge*, because the ground of his opinion there was, that the former charter was void, and the new charter was a charter of creation; and, considered with reference to that state of things, his observations concur with those of Lord *Mansfield* in the preceding case. Secondly, the replication furnishes no answer in point of law to the first and second pleas. The charter is almost entirely one of confirmation; it is in terms confirmatory of certain pre-existing franchises and privileges; and it contains nothing contradictory of, or incompatible with, the custom set out in the pleas. The custom set out in the pleas is, for the burgesses to be elected by the mayor and common council, the common council being made up of two bailiffs and twelve burgesses, being also aldermen. The charter empowers the mayor, bailiffs and burgesses, to elect burgesses, but is entirely silent as to the mode of their election. Now what is there inconsistent or contradictory in the two? If an alteration in the mode of election had been intended, that intention would certainly have been declared in terms; in the absence of any such declaration, the absence of such an intention must be presumed; and then, it is perfectly consistent with the charter to say, that the election is to be by the mayor, bailiffs, and such of the burgesses as were previously invested with the elective power. Thirdly, the bye law set out in the third plea, is good. It is said that the bye law, being made by the

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whole body, is bad, because the charter having given the power of making bye laws to the select body, the whole body have no power to make them. But the power so given to the select body is confined to certain matters specified in the charter, and the election of burgesses is not one of those matters. Besides, the power to make bye laws, is incident to every corporation generally, *Sutton's Hospital* case (a); and the mere fact of the charter empowering the select body to make bye laws in particular cases, cannot deprive the body at large of their general right to make them in others. It is then said, that this bye law excludes an integral part of the corporation from voting at the election of burgesses, and that upon that ground it is bad. But the fact is not so; the bye law does not exclude the burgesses generally from the election: it merely limits the right of election to some of the burgesses. Previous to the charter, the common council consisted of two bailiffs, and twelve capital, or principal burgesses. Since the charter, they consist of two bailiffs, and twelve aldermen, which bailiffs and aldermen must be chosen out of the body of burgesses at large. Therefore, an election of burgesses by the mayor and common council, is, in substance and effect, an election by the mayor and fourteen burgesses. It is settled law, that where it is directed by a charter that the officers of a corporation shall be chosen by the burgesses or commonalty at large, the corporation may, by common assent, for the purpose of avoiding popular confusion, make a bye law, restraining the power of election to a select number of the burgesses or commonalty: *the case of The Corporation of Colchester* (b), *the case of Corporations* (c), *Barber v. Boulton* (d), *Rex v. Ashwell* (e), and *Rex v. Bird* (f). Undoubtedly, where a corporation consists of several integral parts, and the right of election is given jointly to all, a bye law excluding one integral part from the right of election, is void, *Rex v.*

(a) 10 Rep. 31.

(b) 3 Bulst. 71.


(c) 4 Rep. 77.

(d) 1 Str. 314.

(e) 12 East, 22.

(f) 13 East, 367.

*Head (a)*, and *Rex v. Hoblyn (b)*. But no integral part of the body is excluded here; the bye law merely confines the right to a select part of those who previously had it; and in that respect this case differs materially from *Rex v. Hoblyn*, which is cited on the other side as a case in point: for there the charter gave the right of election to the mayor and commonalty, together with the aldermen, and the bye law confined it to the mayor and aldermen only; so that there an integral part of the corporation was excluded, and the bye law consequently was bad. Upon all these grounds it is submitted, that the defendant is entitled to judgment on both the demurrers.

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The case was argued in *Michaelmas* term, 1824, when the Court took time for consideration; and there being a difference of opinion among the judges, upon some of the points of the case, their lordships now delivered their judgments seriatim, beginning with

LITLEDALE, J., who, after stating the pleadings at length, thus proceeded.—Upon these pleadings, it seems to me, that there must be judgment for the crown on the first and second pleas, and for the defendant on the third plea. I consider the replication as an answer to the first and second pleas, and the rejoinder as no answer to the replication. I think the custom for the mayor and common council to elect, as stated in those pleas, is put an end to by the charter. If a corporation accept a charter which prescribes a different mode of election from that which previously prevailed, I think the previous mode of election is extinguished. It has been argued, that this is in the nature of a charter of confirmation, and confirms all the customs which had previously prevailed. In many respects it is a charter of confirmation, because the corporation was in existence before, and had many possessions, liberties, and privileges; those it confirms, but where any

(a) 4 Burr. 2515.

(b) 6 Bro. P. C. 511.

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thing new is introduced, it cannot as to them be considered as a charter of confirmation; and I think it does not confirm this custom, for the general clause of confirmation has nothing to do with customs as to elections prevailing in the borough. *Rex v. Haddock* does not apply to this case. That was a mandamus to a corporation, to restore an alderman. They returned, that he had been removed under proceedings which were fully set out, and the return was held good. The Court said, "That though by the charter stated, no power was given to remove an alderman, yet as the aldermen were, before the charter, removeable for reasonable causes, the same power remained still; for a charter does not merge or extinguish any of the ancient privileges of the corporation." There the charter, however, was silent, and therefore every thing remained as before; but here the charter points out a new mode of election. *Rex v. Larwood* is a similar case, and the doctrine of those cases no lawyer would dispute; but I do not think they apply to the present. The rejoinder states, that the charter was not accepted as to so much of it as relates to the election of burgesses. I think that is a bad rejoinder because a corporation cannot accept a charter in part only. A charter is given by the crown, and is considered as forming one entire scheme, framed on deliberation, for the due government of the borough. Parts of it may be contrary to the wishes of the corporation, but they are compensated by other parts by which valuable privileges are granted. The case of *Rex v. The Vice Chancellor of Cambridge* has been relied on in support of these pleas. Lord Mansfield there seems to have thought, that a corporation might accept a charter in part. He says this: "There is a vast deal of difference between a new charter granted to a new corporation, which must take it as it is given; and a new charter given to a corporation already in being, and acting either under a former charter, or under prescriptive usage. The latter, a corporation already existing, are not obliged to accept the new charter in toto, and to receive either all or none of it; they may act partly

under it, and partly under their old charter or prescription." And *Wilmot*, J., in the same case said, "It is the concurrence and acceptance of the University that gave the force to the charter of the crown. And they may take and accept the body of statutes, or code of laws, separately and distinctly; they are not bound to take all or leave all; and it appears that they here have in fact done so." Though such is the law laid down in that case, it was not necessary to do so, for the office of high-steward had been held long before the reign of *Elizabeth*, and, from the language of those judges it is clear, that the crown did not mean to interfere in the mode of electing the ancient officers of the University, except such as were particularly mentioned. That was not the case of a general charter given to the University to form the entire constitution of it, but a selection of statutes for the election of particular officers, and it is by the aggregate of different statutes, given at different times, that the University is governed. In the more recent case of *Rex v. Amery, Buller, J.*, speaking on this subject, said, "The averment," that is, an averment that the charter, as to the election of aldermen, was duly accepted, "the averment proceeds on a mistake, by supposing that a charter may be accepted in part, and rejected as to the rest. The only instance in which I have ever heard it contended that a charter could be accepted in part only is, where the king has granted two distinct things, both for the benefit of the grantees: there, I know that some have thought that the grantees may take one and reject the other. However that may be, it cannot extend to this case. This corporation must either have accepted *in toto*, or not at all; if they could have accepted a part only of the charter, they would have been a corporation created by themselves, and not by the king. If a charter directed that the corporation should consist of a mayor, aldermen, and 24 common councilmen, they could not accept the charter for the mayor and aldermen only, omitting the common council men. It is impossible to

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support this part of the plea; therefore this allegation, confining the acceptance of the charter to the aldermen only, ought to be amended." Thus there are conflicting dicta upon the subject, for neither of these cases can be considered as a decision upon the point; and there not being any decision, that I can find, in point, and there being conflicting dicta, I am left to form my own judgment in the best way I can; and according to the principles by which corporations are considered as being governed, namely, that they are to take the whole of the entire charter which the crown grants, or none at all, I am of opinion that the rejoinder is no answer to the replication to the first and second pleas, and, therefore, that as to those pleas, there must be judgment for the crown. Upon the third plea, a different question arises, namely, as to the validity of the bye law, which may be sub-divided into two other questions: first, whether the body at large have power to make bye laws; and second, if so, whether they can delegate that power to the mayor and common council; that is, whether they can depute the aldermen to represent the burgesses at large, so as to render an election by the mayor, aldermen, and bailiffs, of equal validity with an election by the mayor, bailiffs, and burgesses at large. In the first place, the charter has certainly given power to the body at large to make bye laws, but it has given no such power to the select body. Every corporation has an incidental power to make bye laws, but if power is given to a select body, the right in the body at large is impliedly taken away, *Norris v. Stapps*(a), recognised in *The City of London v. Vanacker*(b), and it is considered that an express power given to the body at large is unnecessary, because they have it of themselves. So in *Child v. The Hudson's Bay Company*, it was held that a corporation has an implied power to make bye laws; but where the charter gives the company a power to make bye laws, they can only make them in such cases as they are enabled

(a) Hob. 210.

(b) 1 Ld. Raym. 496. 5 Mod. 439, S. C.

to do by the charter, for such power given by the charter implies a negative that they shall not make bye laws in any other cases. But that was a corporation established for a particular purpose, and the bye law which they made was for a purpose foreign to that for which they were incorporated, and therefore they could not make such a bye law. That, however, does not establish the general proposition. In the case of *Rex v. Head*, indeed, Lord *Mansfield* said, "The body at large had no power to make bye laws, because that power is by the charter given to the common council, consisting of the mayor and aldermen; and the common council could not by a bye law take away from the body at large the right of election which the charter had vested in the whole body." I think that case cannot be very accurately reported, and in the first part of what Lord *Mansfield* said, it was not necessary so to determine, because the bye law was bad in every respect. Where the power of making bye laws is given to a select body, there can be no doubt it must be exercised by the select body, and cannot be so by the body at large; but I think the rule only applies to cases where the select body have such power given to them. The power belonging to the body at large, it is only an abridgment pro tanto of their own privileges, but that of their own power, which is independent of it, remains as it was. There may be many reasons why the power to make bye laws should in particular cases be given to a select body; but if bye laws become requisite as to other matters, then, unless the body at large have power to make them, nobody can; for the select body cannot travel out of the powers conferred on them, and therefore many regulations highly important for the good government of the borough would be prevented from being made. Then, it is material to consider whether the bye law in question falls within the powers given to the select body; for if it does, the body at large had no power to make it. This is not, in the proper sense of the word, a *bye law*. It is an order made by the body at large, regu-

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lating the mode of election, which they have incidentally power to make, in order to prevent popular tumult and confusion. It is not a thing which relates to the general government of the borough; it is only that instead of 1500 persons being present at the election, only fifteen shall be so. It would be a most extraordinary thing, if, where the power of election is given to the body at large, the select body should have a right to regulate and control a power which the body at large possess. They may, by the express language of a charter, have such a power; but unless it is given by express words, they ought not to take it by general words. Then, if the select body have no such power, the regulation cannot be made at all, unless by the body at large; and this consequence will follow, that in a corporation where a select body have power to make bye laws for particular purposes, no regulation can be made at all to avoid the inconvenience and confusion of popular elections, which must exist in such a corporation; and one of the powers in the corporation, which from the time of Lord *Coke* down to the present time, has always been considered as belonging to a corporation, must be lost, and cannot be exercised. Then, on the second question, whether the aldermen may be substituted for the burgesses at large: it appears to have been the practice in ancient times, in order to prevent the confusion of popular elections, that the number of the electors should be limited, and that, although the charter gave the right of election to the burgesses at large, a less number than the whole should actually make the election. Some questions having arisen upon this, it was referred by the lords of the council to the judges, to know how the law stood, "and it was resolved by the justices, upon great deliberation and conference had among themselves, that such ancient and usual elections were good, and well warranted by their charters, and by the law also; for in every of their charters they have power given them to make laws, ordinances, and constitutions, for the better government

and order of their cities or boroughs, and by force of which, and for avoiding of popular confusion, they by their common assent constitute and ordain that the mayor, or bailiffs, or other principal officers, shall be elected by a selected number of the principal of the commonalty, or the burgesses, as is aforesaid, and prescribe also how such selected number shall be chosen, and such ordinance and constitution shall be good and allowable, and agreeable with the law and their charters, for avoiding of popular disorder and confusion ; and although now such constitution or ordinance cannot be shewn, yet it shall be presumed and intended in respect of such special manner of ancient and continual election, (which special election could not begin without common consent), that at first such ordinance or constitution was made, such reserved respect the law attributes to ancient and continual allowance and usage, although it began within time of memory." *The case of Corporations*. The same case is briefly noticed in *Jenkins*, 273, case 93. In *the case of the Corporation of Colchester*, Coke, C. J., and the rest of the Court held, that, " If there be a popular election of the mayor and aldermen in corporation towns, and this happens to breed a confusion among them, this may be altered by their agreement, and by the common consent of all, to have their elections made by a fewer number, but not otherwise. But if by their charter they are to be elected by them all, then this is not to be altered, but by and with the general assent of the whole town, and so by this means to take away confusion." The same doctrine is recognised in several reported cases, bringing it down to modern times, namely, *Rex v. Tomlyns*(a), *Rex v. Spencer*, *Rex v. Phillips*, *Lee v. Wallis*, and other cases, the circumstances of which it is not now necessary to advert to. There have, indeed, been cases, where questions have arisen upon the application of this rule, as in *Rex v. Spencer*, where the defendant claimed to be a common councilman of *Maid-*

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(a) Cas. tem. Hard. 316.



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*stone.* There the power of electing the common councilmen was in the mayor, jurats, and commonalty, and the charter gave a power of making bye laws to the mayor, jurats, and common council. The mayor, jurats, and common council made a bye law to restrain the number of electors to the mayor, jurats, and common council, and such of the common freemen as had served the office of churchwarden and overseer of the poor. It was held that the bye law, narrowing the number of electors, could not be supported, because it was not made by the body who had the right of election, and also because it excluded such of the commonalty as had not served an office which had no connection with the corporate character. In *Rex v. Cutbush*, common councilman of *Maidstone*, the bye law was made by the mayor, jurats, and common council, to confer the right of election on the mayor, jurats, common council, and 60 senior freemen. There the bye law was made by a select body, and was held bad, because the charter gave the right of election to the mayor, jurats and commonalty. In *Rex v. Head*, freeman of *Holsten*, the burgesses were incorporated by the name of the mayor and commonalty; by the charter, four aldermen were created, who, with the mayor, were to be the common council, and to have a power to make bye laws. The right of election was in the mayor and commonalty, together with the aldermen. The common council made a bye law, with the assent of the commonalty, that the mayor and aldermen by themselves, and without the commonalty, should elect burgesses; and that was held a bad bye law. But then, an integral part of the electors, namely, the commonalty, was excluded, for the power of election was in the mayor, aldermen and commonalty, and therefore they could not exclude the commonalty, who were by those means not represented. It may be observed, also, that the bye law there was irregular; first, because it was not made by the mayor and aldermen only, who only had the power to make bye laws; but they called


in the commonalty to assist, not as forming part of the meeting; therefore, under the charter, it was bad. Secondly, it was bad under the general powers of a corporation, because the aldermen, as a body, were not the corporation, as the mayor and commonalty were the corporation, and the commonalty were called in only to assist, and not as forming an integral part of the meeting. Thirdly, it was bad, as made by the mayor and aldermen only, for they, as a select body, had no right to make bye laws regulating elections, where the right was vested in the mayor and commonalty, together with the aldermen. In *Rex v. Ashwell*, the charter gave the right of electing aldermen to the mayor and burgesses, who made a bye law, limiting the electors to the mayor and certain of the burgesses, namely, the recorder, aldermen, coroners, common councilmen, and such of the burgesses as had served the office of chamberlain or sheriff; and that was held to be a reasonable and valid bye law. In *Rex v. Bird*, the right of electing burgesses was vested by the charter in the mayor and burgesses, being the corporate body. They made a bye law restraining the number of electors to the mayor, aldermen, and eighteen burgesses named therein, and the defendant was elected by those persons under the bye law. No doubt was entertained as to the general right of the corporate body to make a regulation limiting the number of electors, and the defendant was held well elected. This is the last case upon the subject, and in all these cases the general power of the corporate body is admitted. Then, the question arises, whether admitting the general right of the corporate body, the restriction in this case falls within the principles of law. One objection is, that the aldermen do not represent the burgesses, for there is no doubt that in the body created by the bye law the burgesses must be represented. I am free to admit that there is as little representation of the burgesses here, as one can well imagine, and much less than has occurred in any of the cases; but still the select body do, in a small

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degree represent the burgesses. The aldermen, by being elected, do not cease to be burgesses; they are still burgesses, though with more authority; they are not an integral part of the corporation. If there be a meeting of the body corporate, consisting of the mayor, bailiffs and burgesses, it is not necessary that any of the aldermen should be present, and if they are present, and act, they act not as aldermen, but as burgesses. The aldermen are elected by the mayor and the residue of the aldermen, so that, though remotely, the burgesses have something to do in the election; and I think the aldermen may be considered as representing the burgesses, and that they are a different body from the burgesses at large, only when they are in their character of aldermen discharging the various duties assigned to them. It must be observed, also, that this mode of election is that which was adopted by custom before the charter in question, and, therefore, it may fairly be presumed to be a reasonable mode of election, and not attended with any inconvenience or prejudice to the general interests of the corporation; and though that cannot be taken into account in considering the effect of the second plea, because the facts stated in one plea cannot be brought to bear upon the facts stated in another plea, still we may put the supposition that such a mode of election might exist before the charter. It may be said that the rule laid down in *the case of Corporations* does not extend to burgesses, but is confined to the superior corporate officers, and that the language of the resolution applies exclusively to them. But the same reason applies to burgesses as to the superior corporate officers, and there is a still stronger reason for avoiding popular tumult and confusion, because the election of burgesses is from the nature of their office of more frequent occurrence than that of the superior officers. *Rex v. Head*, was the case of the election of a burgess, but no distinction was made there between a burgess and any superior officer of a corporation. *Rex v. Bird* was also the case of the election of a burgess, but there, also,

no such distinction was taken ; for though the point was noticed slightly in argument, it was altogether unnoticed in the judgment of the Court. It has, indeed, been held, as appears by 4 *Inst.* 48, that if a corporate body at large have the right to elect members of parliament, they cannot delegate that power to a select body ; but that is because it is considered to be for the benefit of the public that they should all have votes, and it is not to be compared to the case of the election of a mayor or other corporate officer. If the bye law be found inconvenient, the corporate body may repeal it, by the same authority by which they made it ; and therefore if any mischief is likely to arise, they have it in their power to prevent it themselves. Upon the whole therefore I am, for these reasons, of opinion, that the third plea is good, and that on that plea, our judgment ought to be for the defendant.

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HOLROYD, J.—As we all concur in opinion upon the question respecting the acceptance of the charter, and as I understood the judgment upon that point was to be delivered by my Lord Chief Justice, I shall confine my observations to the two questions arising upon the demurrer to the third plea. The first of those questions is, whether the power of making the bye law in question was taken away from the body at large by the power of making bye laws given by the charter to the select body, that is, to the mayor and common council : the other is, whether, supposing the body at large to have jurisdiction to make bye laws or regulations affecting the mode of electing burgesses, this is a valid bye law. With a view to these two questions, it is material to attend to the particulars of the third plea, as they stand admitted by the demurrer to that plea. It appears by that plea, and must be taken to be admitted by the demurrer to it, “ that the borough of *Chepping Wycombe* was immemorially an ancient borough, and that before, and until, and at the time of the granting the letters patent of *Charles* the Second, the *burgesses*

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were a body corporate, by the name of the *mayor, bailiffs, and burgesses* of that borough, and that within the borough there immemorially had been, or of right ought to have been, and there still ought to be an indefinite number of burgesses of the borough; that *Charles* the Second, by his letters patent, dated 16th *November*, in the 15th year of his reign, granted and confirmed to the said body corporate, the mayor, bailiffs, and burgesses, that from thenceforth for ever, *one of the burgesses*, to be elected in manner after mentioned, should be the mayor." "It is to be observed that this, with what follows in the plea, shews that the *aldermen* were considered as still continuing to be *burgesses*, because the *mayor* was to be elected out of the *aldermen*, and yet the charter directs that *one of the burgesses*, to be elected in manner after mentioned, should be *mayor*. And the *mayor* is directed to be *sworn* before the last mayor, or, in his absence, before the *aldermen and the rest of the burgesses* present; and the same with respect to the bailiffs. The plea then states, "that two burgesses should be the bailiffs, and twelve men, continually inhabiting within the borough, should be aldermen, and that the mayor, bailiffs, and burgesses of the same borough, (that is, the *body corporate*, and therefore including the aldermen), *and their successors*, or the major part of them, might elect such other men, inhabiting or not within the borough, as to them should seem expedient, to be burgesses. That the king, by his charter, granted and confirmed to the said mayor, bailiffs, and burgesses of the said borough, (that is, to the body corporate, and therefore including the aldermen), *and their successors*, that the aforesaid aldermen and bailiffs, and their successors, should be the common council of the borough, and should be aiding and assisting to the mayor in all matters and causes touching and concerning the borough aforesaid. That the king granted and confirmed to the aforesaid mayor, bailiffs, and burgesses of the borough aforesaid, (that is, to the whole body corporate, including the aldermen), *and their successors*, that the

*mayor, aldermen, and bailiffs* of the borough aforesaid, and their successors for the time being, or the major part of them, of whom the mayor should be one, should have power and authority to make such reasonable bye laws as to them should seem good," for certain purposes therein mentioned. Those purposes are, for the good rule and government of the burgesses, artificers, and inhabitants of the borough, and for declaring *in what manner and order* the mayor, aldermen, bailiffs and burgesses, the artificers, inhabitants, and *residents* of the borough, should behave themselves in their offices, mysteries and business within the borough, and the limits thereof; (that is, how these several officers and persons, and not how the *body corporate* itself, shall behave or act, or what it should do), and otherwise for the further good and public advantage and rule of the borough, (not touching or concerning the *body corporate itself*, or the government of *itself*, or the exercise of *its* powers), and for the victualling of the borough, and for the better preservation, government, disposition, &c., of the possessions, &c., of the mayor, bailiffs, and burgesses, (that is, of the body corporate), and their successors, and other matters and causes whatsoever, touching or concerning the said borough, or the state, right, or interest of the said borough, with power to the body corporate, (that is, to them and their successors), by the mayor for the time being, and the bailiffs and aldermen, being the common council, or by the major part of them ~~as~~ aforesaid, to assess reasonable pains and fines upon delinquents. The plea goes on to state, that the charter then appointed one person therein named to be the first mayor, two other persons therein named to be the first bailiffs, and twelve other persons therein named to be the first twelve aldermen. (Here the learned judge stated the mode of election of the mayor, bailiffs, and aldermen, prescribed by the charter, as set out fully above in the pleadings). It then avers, that the letters patent were duly accepted by the mayor, bailiffs, and burgesses of the borough aforesaid;

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that after the acceptance of the said charter, and before the defendant's election, to wit on 1st *December*, 1765, the then *mayor*, *bailiffs*, and *burgesses*, duly made a *bye law*, not now extant in writing, for the better rule and government of the *borough*, touching and concerning the election of future burgesses, *in order to avoid popular confusion and disorder* in such elections. The bye law was, that the *mayor* and *common council* of the borough, or the major part of them, duly assembled together for that purpose within the borough, should, by themselves, and without the concurrence or assistance of *the rest of the burgesses*, elect such persons to be burgesses as to them, or the major part of them, should seem meet; which bye law has been since constantly kept, and is still in full force. Lastly, the plea states, that the defendant was duly elected a burgess by the mayor, and the major part of the then common council, duly assembled together within the borough, pursuant to the bye law, and that he was sworn, and eo warranto, executed the office of a burgess. To this plea there is a demurrer, upon which the two questions which I have already stated arise. The first is, whether the power of making the bye law in question was taken away from the body at large by the power of making bye laws given by the charter to the select body, that is, to the mayor and common council. I am of opinion, that the power of making the bye law in question, is not thus taken away from the body at large. The bye law in question, if it had been made by the *select body*, to whom a power of making bye laws is given by the charter, would have been void, according to the doctrine advanced in *Rex v. Spencer*, and *Rex v. Cutbush*; because the select body did not, for this purpose, represent the body at large, and the select body would thereby be taking away a privilege from others, and narrowing and confining it solely to themselves. In *Rex v. Spencer* it appeared that the town of *Maidstone* was incorporated by a charter of 21 *Geo. 2*, by the name of mayor, jurats, and commonalty, consisting of

a mayor, thirteen jurats, including the mayor, and 40 common councilmen. Power was granted to the *mayor, jurats, and common council*, to make *bye laws*, but the election of common councilmen was, by the charter, to be by the mayor, jurats, and *commonalty, or the major part of them*. By a bye law made 18th August, 1764, by the mayor, jurats, and *common council*, the right of election was given to the mayor, jurats, and common council, and such common freemen as resided in, and had served for a year the offices of churchwarden and overseer for the town and parish of *Maidstone*, or the major part of them. It was held, among other objections, that such a bye law, affecting, narrowing, and restraining the rights of the body at large, could not be made *by the select body*, notwithstanding the power of making bye laws was given to them by the charter; and Lord *Mansfield* drew this distinction: he said, "Where the power of making bye laws is by charter given to a select body, they do not represent the whole community; and therefore cannot assume to themselves what belongs to the body at large; but, where the power of making bye laws is in the body at large, they may delegate their rights to a select body, who become the representative of the whole community." So, in the present case, I think, that though the power of making bye laws for particular purposes, or even in general, was given by the charter to a select body, yet, if by reason that such power cannot in the present case be exercised by the select body, on account of the rights of others, it is vested, or remains incidentally in the body at large. Perhaps the body at large may, by a bye law made by common or general assent, delegate their right of election of burgesses to a select body, being composed partly of themselves, the same as if the power of making bye laws, either for particular purposes, or in general, had not been given to a select body, but had been wholly vested in the body at large; more especially if, as in the present case, the bye law cannot in any instance be carried into effect, without

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being thereby confirmed by the very body, the mayor and common council, to whom the power of making bye laws is expressly given by the charter. In *Rex v. Cutbush*, a similar bye law appears to have been made, by the *mayor, jurats, and common council*, transferring the right of election of common councilmen, from the mayor, jurats, and *commonalty*, to the mayor, jurats, and such of the commonalty as should be of the common council, and *sixty others* of the commonalty who should be the senior *common freemen* for the time being, or the major part of them. The question was, whether that was a good bye law. The Court held it to be bad, being manifestly contrary to the intent of the charter, and being *made by a part of the corporation*, to deprive the rest of their right to elect, without their consent. *Yates, J.*, there said, "in the case of *Corporations*, 4 Rep. 77 b, the bye law which was put in question did not vary the constitution, and the great ground of that resolution was, that it must be made *by common assent*. But a *bye law made by a part of the corporation to exclude the rest, without their assent, is not good.*" In this case, the power in the body at large of making the bye law in question, which they would possess incidentally, except for the power of making bye laws given to the select body, is not, as it appears to me, inconsistent with the power of making bye laws expressly given by the charter to the select body; and upon principle, I think that this incidental power is not taken away from the body at large, in cases where in point of law it cannot vest in, or be exercised by the select body, except so far as the continuance of this power in the body at large would be inconsistent with the express power given to the select body. It appears by *Haddock's case*, that the ancient powers and privileges continue to exist, and are not merged or extinguished by a new charter. That was the case of a return to a mandamus to restore him to the office of alderman. The return was, that he had been removed under a prescriptive power, which had existed previous to the

charter of 13 *Car.* 1. The Court all held this return good, for though by the charter of *Car.* 1, there is no power given for the corporation to remove an alderman, yet when the consiliarii, alias aldermanni, were before the said charter removeable for reasonable cause, the same power still remains, for that the charter doth not merge or extinguish any of the ancient privileges, but the corporation might use them as before; and if it were otherwise, it would be very mischievous to most of the corporations in *England*, who have taken new charters, but were ancient corporations before. That I apprehend to be the law, unless where the charter vests a prior ancient existing power or privilege, elsewhere than where it was originally, or varies it, as in the case on which the question upon the other part of the pleadings here has arisen. The same principle, also, has been adopted and applied in a former case of *Hicks v. Launceston* (a), in E. 8, *Car.* 1, to the case of an election. There it is said, “if the king create a corporation of a mayor, and eight aldermen, with a clause, that upon the death or a motion of any alderman, it should be lawful for the mayor, and the rest of the aldermen, *within eight days* next after such death or a motion, to elect another alderman in his place, although there be no election within the eight days, yet they may elect an alderman at any time afterwards, for they have a power to elect another *as incident to the corporation created*. For anciently, corporations had no such clause giving them power to elect, *and this affirmative power does not toll the implied power incident to the corporation.*” So, I say in this case, the affirmative and express power given by the charter to the select body to make bye laws, does not toll the implied power incident to the corporation, in cases where the affirmative and express power cannot by law be exercised by the select body, or to which it does not extend; but that the same principle which in those cases, namely of a motion and election, continued the pre-existing

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(a) 1 Rol. Abr. 513, tit. Corporation. G. Pl. 5.

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incidental power of motion and election, by reason that the charter did not take away or annul it, will in the present case continue in the body at large their incidental power to make bye laws, in such cases, and so far as that power cannot by law, or is not in fact, vested in the select body. The reasons given in 1 *Rol. Abr.* 513, *Corporation*, G. pl. 4, for the power of making bye laws, being incident to a corporation, namely, that "a body politic cannot be governed without laws," and that "they ought always to be subject to the law of the realm as subordinate to it," apply to the continuance of such incidental power in the body at large upon those subjects, and in those cases to which the power expressly given by the charter cannot by law, or does not in fact, extend. Lord *Mansfield*, indeed, in *Rex v. Head*, is stated to have said, "the body at large had no power to make bye laws, because that power was by the charter given to the common council, consisting of the mayor and aldermen. And the common council could not by a bye law take away from the body at large the right of election which the charter had vested in the whole body." And he adds, "This is exactly the case of *Maidstone*." But that dictum was quite extra-judicial, for the case was decided on another ground, namely, that the bye law there was not made by the body at large, but only by the mayor and aldermen, *though with the assent of the commonalty*, but those words, "with the assent of the commonalty," made no difference, as it was held that the commonalty could not be assembled *to assent*, and it was considered as the bye law of the mayor and aldermen only. What Lord *Mansfield* is stated to have said, therefore, was extra-judicial, and unnecessary for the decision of the case which he held to be exactly the case of *Maidstone*. But taken as a general proposition, what he said is not incorrect, that the body at large had no power to make bye laws in general, because that power was by the charter given to the common council. But it was not agreed, discussed, or considered, nor was it necessary, or at all mate-

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rial that it should be, whether because the common council could not make the bye law there in question, inasmuch as they would thereby take away a right of election from the body at large without their consent, that very circumstance did not leave the power in the body at large, as an incidental right not taken from them of making bye laws to regulate the right of election of freemen vested in them by the charter. That point was not put or considered; it was not ripe for consideration. Where a power is expressly given, either to a select body, or to the body at large, to make bye laws, *on particular occasions, or for particular purposes*, the power ought perhaps to be limited to those occasions and those purposes only; though from the reasoning in *Plowden*, 113, and the cases in *Rol. Abr.*, that may be otherwise where such a limited power is expressly given to the body at large. But if it is to be so limited, that can only be because of the implication that such was the intent of the grantor, and because, otherwise, the restraining words, “on the particular occasions and for the particular purposes,” would be rendered useless and inoperative. The case of *Child v. The Hudson’s Bay Company* applies to this point. There the Company were by charter incorporated and empowered to make bye laws, *for the better government of the Company, and for the management and direction of their trade to Hudson’s Bay*. Lord *Mansfield* said, “A corporation has an implied power to make bye laws, but where the charter gives the Company a power to make bye laws, they can only make them in such as they are enabled to do by the charter; for such power given by the charter implies a negative that they shall not make bye laws in any other cases. Thus where the Company in the present case have a power given them by the charter to make bye laws for the management of their trade to *Hudson’s Bay*, this power implies a negative that they cannot make any other bye laws; à fortiori they cannot make bye laws in relation to projects and insurances, which by act of parliament (6 Geo. 1, c. 18),

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are declared to be illegal." It may be observed too, that the bye law gave the company a lien on the stock, in the company, of any member who should be indebted to the company; and that they applied that bye law to pay the debt of a member claimed to be due to them on a project made by them of insurances on marriages and apprentices. The rule of construction, therefore, evidently is, because of the implication that it was the grantor's intent that the power of making bye laws thus given, whether to a select body, or to the body at large, should be confined to the particular occasions and purposes expressly mentioned, and because otherwise the restraining words would be rendered of no use. But supposing that to be the law as applicable to such cases, (though limited words of permission have not always been so restrained, as appears by the cases in *Plowden*, 112 b. and 113, and in 1 *Rol. Abr.* 514, 1 and 5), still that restrictive rule of law would not be applicable to the present case. The question here is, not whether the select body have made, or could make, the bye law in question by virtue of the power given them to make bye laws, to be considered as a power restrained by the charter to particular purposes only, or as a general power restrained only by the rules of law; nor is the question, whether with a limited power of making bye laws given by the charter to the body at large, that body has an incidental right to exceed that express limited power: but the question is, whether in a case to which the express power of making bye laws given to the select body, be the power so given limited or general, cannot by law extend, the incidental power vested by general law in the body at large is impliedly taken away, so that it cannot be exercised by them even though confirmed by the act of the select body. I think it is not in such a case impliedly taken away from them, but that it may be exercised by them. Even, therefore, though the power given to the select body in this case should be considered as a general power to make bye laws for the good government of the body at large, still, where

the charter also gives power to the body at large, or even to another select body, to do a particular thing, (to elect burgesses, for instance), I think it also gives, necessarily and incidentally, to such body, a power to make such regulations as may be requisite or reasonable the better to carry the same into effect, that is as to the mode of election, (such as giving notice, proposing, seconding, discussing, voting, and determining the same), as virtually excepted out of the general power otherwise given of making bye laws. It is, in my opinion, a power inherent in, and incidental to the right of election, and binding on the body having that right, notwithstanding the general power of making bye laws be vested in a different body; otherwise the incidental power would be thereby entirely taken away, even though the bye laws were adopted and confirmed, which is indeed in effect no more than the present case, by the very body, the mayor and common council, to whom the power of making bye laws is *expressly* given. Here, the bye law has been adopted and in effect confirmed by the mayor and common council, by their acting under it at their elections, as the bye law is upon the pleadings admitted to have been ever since the making of it constantly kept and observed by the body corporate; so that it is a bye law made by the whole body corporate, regarding their rights, the exercise of which they alone can have power to regulate, and with which no other body has a right to interfere, and adopted and confirmed by that very body, to whom alone the power of making bye laws is *expressly* given. Then, the next question is whether (supposing the body at large to have jurisdiction to make bye laws or regulations touching the mode of election of burgesses), this is a valid bye law. On this question let us look at the previous state of the corporation, and the effect of such particulars of the charter to be applied thereto as more especially regard this question, and as they are to be collected from those pleadings upon which this question arises. The third plea shews that the charter was not one


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creating a new corporation, but one granted to the then existing corporation of an ancient *prescriptive borough*, having a right by prescription to an indefinite number of burgesses;—that this body corporate, and also its corporate name, comprises not only the different parts of mayor, bailiffs, and burgesses, but the aldermen also, though not *nominally* expressed in the corporate name;—that all these parts or offices are originally taken out of the burgesses at large;—and that all the members thereof continue in contemplation of law to be burgesses, though they are clothed with *additional* powers as *principal* burgesses, and with superior names of office, as mayor, aldermen, and bailiffs, in respect of their executing the particular functions of those respective offices, with regard to which functions they may respectively become distinct integral parts of the body corporate, as *contra-distinguished* from each other, as well as from the burgesses at large, but may have to execute other functions, not as distinct integral parts, but as distinct individual members only of one whole, namely, of the entire body corporate. The king ordains by the charter, that henceforth for ever one of the *burgesses* should be *mayor* and two of the *burgesses bailiffs*, and though he describes the twelve aldermen to be *men*, not saying burgesses, inhabiting continually within the borough, yet it appears by the charter that all future elections of aldermen are to be out of the *burgesses*. So that the king declares his will that *all* the officers shall be chosen, mediately or immediately, out of the *burgesses*, that is the aldermen and bailiffs out of the *burgesses* immediately, and the mayor out of the aldermen, that is, out of burgesses who have also become aldermen. It also appears by the charter that no third person or body of men are to have any thing to do in the election to those higher offices; the election of mayor being by the integral parts of mayor and aldermen, bailiffs and burgesses, of bailiffs by those of mayor, aldermen, and bailiffs, and of aldermen by those of mayor and aldermen. This would appear more strongly by the charter



as enrolled in the rejoinder to the special replication to the first and second pleas, than it does by the parts of the charter stated in the third plea; as the first mayor, aldermen, &c., by the charter as so enrolled, appear to have been all either in the same offices at the time of granting the charter, or else burgesses. The election of burgesses is by the charter required to be by the whole body corporate, as one body, not by different integral parts. The individuals are to act as members of the whole, that is, as burgesses; not as members of integral parts. The doctrine of integral parts does not apply; the duty of each is as of one of a whole; the same duty in the election appertains to each. The bye law narrows it to be exercised by a particular part only, instead of by the whole, namely, by certain principal burgesses, as in *The case of Corporations*. An election by those principal burgesses, at a meeting duly assembled for that purpose, if the bye law is a valid one, is, in law, so long as the bye law remains in force, an election by the whole body corporate which they represent; and an election by the major part of those principal burgesses so duly assembled, is, in the same manner, an election by the major part of the whole body corporate. It appears, therefore, that the power of electing burgesses was by the charter given to the whole body at large, and not to distinct integral parts, whether comprising, or not comprising the whole. To elect the mayor, it is given to the mayor, *aldermen*, bailiffs, and burgesses, not to the body corporate as one body, as in the election of burgesses, but to these four different integral parts, as integral parts, though comprising the whole body. With respect to the election of a mayor, therefore, a bye law excluding an integral part of the electors, *might, perhaps*, be bad. The same observation would apply to the election of *bailiffs* or *aldermen*, because they are to be elected, the former by the mayor, *aldermen*, and bailiffs, and the latter by the mayor and *aldermen*. To all these cases the doctrine as to integral parts, as laid down in the *Maidstone* cases, namely, that a

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bye law excluding an integral part of the electors is bad, *may* apply; but it cannot apply to the election of *burgesses*, which is given to the body at large, that is, to all the *burgesses*, whether holding any of the higher offices of the corporation, or not, and comprises the whole body. It extends to them all, as *burgesses*, or members only of the body corporate, and is not given to any of them as holding, or by reason of their holding, any further particular office in the body corporate, nor as members of any integral part; it only does not exclude them by reason of their holding any such offices. If they were to take as members of integral parts, the gift of the power to the mayor, bailiffs, and *burgesses*, as a gift to integral parts, would not include the whole body, unless the aldermen are included among the *burgesses*, or it would not extend to the aldermen, as included in any of those integral parts, except the *burgesses*. If the power of electing *burgesses* in this case is to be deemed to be given to integral parts, those integral parts are, in my opinion, the mayor, the bailiffs, and the *burgesses*; for the aldermen are included in the *burgesses*, as being persons who are *burgesses* as well as aldermen. If so, the bye law in question does not strike off any integral part, for it leaves the mayor, bailiffs, and such of the *burgesses* as are also aldermen; and on that account, therefore, it is not void. But, supposing it must be taken, that the bye law does in effect strike off an integral part of the electors, namely, the *burgesses*, yet, if the doctrine in the *Maidstone* cases, (which it is to be recollected was extra-judicial, and unnecessary to the decision of those cases, though I do not dispute that doctrine when properly qualified), is confined to cases where the charter gives the right of election to integral parts, as such, whether comprising, or not comprising the whole, (and I think that doctrine ought to be so confined), it may still be correct. Indeed, in *Newling v. Francis (a)*, Lord *Kenyon* says, "If the bye law does not exclude those persons who

(a) 3 T. R. 189.

were intended by the king's charter to concur in the election, or does not narrow the number of persons eligible, it may be good. A bye law cannot indeed exclude integral parts, as was decided in the *Maidstone* case, but generally speaking, within these bounds the mode of election may be regulated by provident bye laws." To this doctrine, coupled with the above qualification, I fully agree. The allegation in the third plea is, that after the acceptance of the charter, and before the defendant's election, to wit, on 1st *December*, 1765, the then *mayor, bailiffs, and burgesses* duly made a *bye law*, not now extant in writing, *for the better government of the borough, touching and concerning the future election of burgesses, in order to avoid popular confusion and disorder in such election, that the mayor and common council of the borough, or the major part of them, duly assembled together for that purpose within the borough, should, by themselves, and without the concurrence or assistance of the rest of the burgesses, elect such persons to be burgesses as to them or the major part of them should seem meet, which bye law has been since constantly kept, and is still in full force.* I think an ordinance that the mayor and common council, that is, the mayor, aldermen, and bailiffs, should elect burgesses, is in effect giving the power of election to the principal burgesses, that is, to such of the burgesses as should be holding higher offices. Now, that such a bye law, made *by the whole body corporate*, that is, by the whole body that had the right of election, is valid, is a doctrine agreeable to, and supported and established by all the decided cases, from *The case of Corporations* down to the present time. Doubts indeed have been thrown out on two occasions by Lord *Kenyon*, first in *Rex v. Ginever (a)*, where he said, "I wish to avoid saying any thing respecting the propriety of a bye law, to restrain the number of electors;" and afterwards in *Rex v. Holland (b)*, where he said, "not that I am prepared to say, that such a bye law, if it had existed,

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(a) 6 T. R. 735.

(b) 2 East, 74.

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would have been sufficient to have transferred the power from the body at large to a select part of it." But Lord *Ellenborough*, in the subsequent case of *Rex v. Bird (a)*, observed, "that no authority was referred to by Lord *Kenyon* for the doubt expressed by him," and all the cases, both before and since these dicta of Lord *Kenyon*, form, in my opinion, an abundant authority for the removal of that doubt. The reasonableness and utility of such a bye law, is strongly confirmed by the practice and opinions of numerous bodies of men, though not bodies corporate, especially in matters affecting their own interest, or the public good, and requiring sound discretion, where, in order to act most advisedly, discreetly, and beneficially, they refer the matter to the consideration and decision of a committee composing a smaller number, appointed by and from among themselves. The first case on the subject is, *The case of Corporations*. In that case, "it was demanded of all the judges, that where divers cities, boroughs, and towns are incorporated by charter, some by the name of mayor and commonalty, or mayor and burgesses, &c., or bailiffs and burgesses, &c., or aldermen and burgesses, &c., or provost, or reeve and burgesses, or the like: and in the said charters it is prescribed that the mayor, bailiffs, aldermen, provosts, &c., shall be chosen by the commonalty or burgesses, &c., if the ancient and usual elections of mayors, bailiffs, provosts, &c., by a certain selected number of the principal of the commonalty, or burgesses, commonly called the common council, or by such like name, and not in general by the whole commonalty or burgesses, nor by so many of them as would come to the election, were good in law, forasmuch as by the words of charters the election should be indefinitely by the commonalty or by the burgesses, (which is as much as to say, by all the commonalty or all the burgesses), &c.; which question being of great importance and consequence, was referred by the lords of the council to the justices, to know the law in this case, because divers attempts were of

(a) 13 East, 367.

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late in divers corporations, contrary to the ancient usage, to make popular elections : and it was resolved by the justices, upon great deliberation and conference had among themselves, that such ancient and usual elections were good, and well warranted by their charters, and by the law also, for in every of their charters they have power given them to make laws, ordinances, and constitutions, for the better government and order of their cities, or boroughs, &c.," (that is to say, they have that power given them, either expressly, or incidentally), " by force of which, and for avoiding popular confusion, they, by their common assent, constitute and ordain that the mayor or bailiffs, or other principal officers, shall be elected by a selected number of the principal of the commonalty or of the burgesses, as is aforesaid, and prescribe also how such selected number shall be chosen ; and such ordinance and constitution was resolved to be good and allowable, and agreeable with their law and their charters, for avoiding of popular disorder and confusion." (And yet those are cases in which the elections are by the bye laws confined to an integral part or parts, as the common council, &c., omitting one integral part, if it be one, as the commonalty or burgesses, as much, to the full, as in the present case). " And although now such constitution or ordinance cannot be shewn, yet it shall be presumed and intended, in respect of such special manner of ancient and continual election, which special election could not begin without common consent, that at first such ordinance or constitution was made ; such reverend respect the law attributes to ancient and continual allowance and usage, although it began within time of memory." Lord *Coke* afterwards adds, " and according to this resolution, the ancient and continued usages have been in *London, Norwich*, and other ancient cities and corporations, and God forbid that they should be now innovated or altered, for many and great inconveniences will thereupon arise, all which the law has wisely prevented, as appears by this resolution." The

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doctrine in the *Maidstone* cases, as to a bye law excluding an integral part of the electors, would apply to the question put to the judges in *The case of Corporations*, if it is not to be qualified in the way I have suggested, and is not more applicable to the present case than to that case; and yet, notwithstanding that doctrine, *The case of Corporations* was not disputed in the *Maidstone* cases, nor in any case that I have seen before or since the *Maidstone* cases, except so far as that case may be considered to have been questioned by the doubts thrown out by Lord Kenyon. *The case of Corporations* related to the elections of mayors and other principal officers of corporations, which are not less important than the elections of freemen or burgesses; but the principle and rule have since been laid down generally, and have been held to apply as well to elections of freemen or burgesses, as to elections of their principal officers. The next case is that of *The Corporation of Colchester*, where this was said. “Nota, by Coke, C. J., and the whole Court, in this case of *Colchester* and their corporations, that if there be a popular election of the mayor and aldermen in corporation towns, and this happens to breed a confusion among them, this may be altered by their agreement, and by the common consent of *all*, to have their elections made by a fewer number, but not otherwise. But if by their charter *they are to be elected by them all*, then this is not to be altered, but by and with the general assent of the whole town, and so by this means to take away confusion.” There he puts the case where a charter directs the *mode* of election to be by them all; and yet he says, that by and with the general assent of all, and in order to prevent confusion, they may delegate the exercise of their right of election to a part. The same doctrine is referred to and confirmed in *Regina v. Larwood* (a) by Eyres, sen. Just., in the case of the election of a sheriff of *Norwich*; and by Lord Hardwick, in *Rex v. Tomlyn*. In the latter case the defendant was chosen a

(a) Comb. 316.

jurat of *Maidstone* by a select number of the inhabitants, whereas the charter directed the choice to be by the inhabitants, which referred to a majority of the whole. It was objected to on the motion for a quo warranto information, that there had been a long usage to chuse them in that manner; but the Court granted the information: for, per Lord *Hardwick*, "though, according to *The case of Corporations*, where the charter directs the election to be by the mayor, jurats, and commonalty, the body may make a bye law to vest the power of election in any select number, yet here the question being, whether there is such a bye law, the Court cannot determine that on motion, but it must be tried; and therefore in the case of *Brecknock*, though the special verdict found that the defendant's election was according to a very long usage; yet, it not having found expressly that there was a bye law for that purpose, judgment was given against the defendant; for no usage, how long soever, in case of a corporation by charter, can support an election made otherwise than according to the records of the charter, unless the jury find that there was a bye law for that purpose, *though possibly it may be otherwise in case of a corporation by prescription.*" Afterwards, in *Rex v. Spencer*, and *Rex v. Cutbush*, which were also *Maidstone* cases, the general point was considered as settled. These last two cases recognise the power of the whole body to narrow the number of the electors, but with the restraints against requiring qualifications dependent upon the means or interference of others, and against excluding any integral part. Then followed the cases of *Rex v. Ashwell* and *Rex v. Bird*, both which are in point upon this question, except that in the former the election was of a superior officer of the corporation, an alderman; but in the latter the election was of a burgess, as in the present case. They narrowed the exercise of the power of election to a part of the burgesses themselves, namely, those principal burgesses, &c., mayor, aldermen, &c., who had become so out of the general body of the burgesses,

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and to certain other burgesses elected by the body at large, without the interference of any persons, except the burgesses, or persons derived out of them. It is a delegation pro tempore, that is, until it is revoked by themselves, to a part, and an adoption of persons selected under that delegation to a part of themselves, and, virtually therefore, until their bye law is revoked, an election of the whole body. Altering the proportions of each or any of the different parts, even considering them as integral parts, as was done in the cases I have last mentioned, may as much affect, and may be in effect as great an alteration and change of the right and power of election, and as much at variance with the charter, as the exclusion of the whole of an integral part; and yet a bye law producing such an alteration and change, but not excluding an integral part, may, according to all the cases, be a valid bye law. But as the charter, as I think I have already shewn, clearly names and considers the aldermen, as being still a part of the burgesses, it is this consideration which makes the two cases last alluded to completely in point upon the question as to an integral part, that is, the burgesses; the delegation by the bye law being to the mayor, bailiffs, and part of the burgesses, that is the aldermen, though exclusive of the rest of the burgesses. In the above case of *Rex v. Bird*, which arose like the present, upon the election of a burgess, a distinction was taken in argument between the election of annual officers of corporations, as mayors, &c., and the elections of burgesses. It was contended that the right of limiting the number of the electors was confined to the elections of the former, and was not intended to apply to the latter. But no such distinction between burgesses and annual officers, nor any distinction in that respect, was taken in any of the prior cases, between the election of burgesses at large, and that of other corporate officers, whether annual or for life, though several of those cases arose upon the election, not of annual officers, but of principal officers for life, such as aldermen, common council-



men, &c.; and particularly, in the above case of *Rex v. Ashwell*, where the bye law was established, and in *Rex v. Head*, upon the election of burgesses, where the bye law was, upon other grounds, held to be void: and, notwithstanding the distinction was pressed in *Rex v. Bird*, the Court immediately decided against it, as a matter about which they entertained no doubt, and afterwards adverted to, and confirmed that decision, when they delivered their judgment upon another point, on which they took time for deliberation. The same mischief and inconvenience in avoiding popular confusion are prevented by such bye laws, when applied to the election of burgesses, as when applied to the election of principal officers, annual or for life; and the rule was expressly applied to both those kinds of officers in *The case of Corporations*. If it is said that the bye law may have been attained by means of the common council having been a majority of the corporation at the time when the bye law was made, and against the consent of all the rest of the burgesses; and that the common council may, by forbearing to exercise their power of the election of burgesses, keep up such a majority in themselves, as will render the repeal of the bye law impossible, and so retain the right of election against the consent of the rest of the corporation; the former part of the objection would equally apply to the instances put in *The case of Corporations*, and in all the other cases where the validity of a similar bye law has come in question. But it is hardly to be supposed, in a corporation consisting of an indefinite number of burgesses, with a common council for their government, and for that of the town, that the common council, who are to consult and advise, and not the burgesses at large, are the main body, or the majority; or, that where the right of electing burgesses is in the burgesses at large, they would ever suffer themselves to become the minority, while they keep the power of election in themselves previous to the bye law; or would not repeal it if they found their power so to do endangered by

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the common council disusing the exercise of their power of electing burgesses. The burgesses in general must in the first instance, I think, be taken to be the main body of the corporation ; and if so, their power of making, or refusing, or repealing the bye law, will continue in themselves, except by their own neglect or default ; and it is a probable event, or inconvenience, and not a merely possible one, which, according to the doctrine in *Rex v. Bird*, furnishes a valid objection to a bye law. It must, however, be remembered, that such a bye law to be valid, must, according to *The case of Corporations*, be made “ by their common consent,” and according to the *Colchester* case in *Bulstrode*, “ by the common consent of all ; and whatever may be the real import of those terms, and whatever consent may be requisite, to give validity to this bye law, whether an unanimous consent, or the consent of a majority, must, I think, upon this demurrer, be taken to have been given to its making. Upon these grounds, I am of opinion that this is a valid bye law, and consequently that the defendant is entitled to judgment upon the demurrer to the third plea.

BAYLEY, J.—I shall not go over the ground which has been so ably discussed, by my learned brothers *Littledale* and *Holroyd*, except on the point in which my opinion differs from theirs, and that is upon the validity of the bye law of 1675. I shall confine myself to the question as to that bye law. It is material to see of what the corporation consists, because part of my objection to the bye law in question depends on the making such a bye law in such a corporation as this. This is a corporation consisting of a mayor, two bailiffs, twelve aldermen, and an indefinite number of burgesses. No inchoate right in any body is stated ; no right by purchase, or by servitude ; nor any thing, except the choice of those persons who, from time to time, are chosen under the charter. This is a bye law, not for regulating the election of a head officer ;

not for regulating the election of any of those persons who must of necessity fill specific offices ; but it is for the election of the indefinite body of burgesses, and, therefore, virtually vests in the persons in whom this bye law did vest the power, the decision of saying, of what number the corporation shall, from time to time, consist. I consider it to be a very different thing, whether a bye law is to say who shall fill a specific office, when that specific office must be filled by some body, or to say who shall be a common councilman, when the office of common councilman must be filled by somebody who is a member of the corporation, and a bye law saying of what number the corporation shall consist ; that it shall vest in a select body, not the power of saying who shall fill the office, but of saying if the indefinite body shall consist of five, ten, fifty, five hundred, or any other number. But, before I discuss this point upon the merits, it is material that I should shortly go through the cases, to see how far the point is open ; because unless they admit of the distinction to which I have alluded, I shall not feel myself at liberty to introduce it now. The first authority on the subject is *The case of Corporations*. The question there put was, as to the election of mayors, bailiffs, provosts, &c. ; and the resolution was, that a bye law, that the mayor, or bailiffs, or other principal officers, should be elected by a selected number of the principal of the commonalty or burgesses, would be good. That applies to the principal officers, and to the principal officers only. In 3 *Bulstrode*, 71, there is a passage stating that it was held by *Coke*, C. J., and the whole Court, “ that if there be a popular election of the mayor and aldermen in corporation towns, and this happens to breed a confusion among them, this may be altered by their agreement, and by the common consent of all, to have their elections made by a fewer number, but not otherwise.” That applies only to the mayor and aldermen. There is a passage in *Hobart*, 15, where it is said, that where there was a corporation made by charter, and by the

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same an ordinance that the provost and burgesses only should chuse members of parliament, (he is speaking not of a bye law, but of an ordinance by the king, as the preceding paragraph shews), the law will vest this privilege in the whole corporation in point of interest, though the execution of it be committed to some persons, members of the corporation. The preceding paragraph states, that the king may ordain that such a place may send members to parliament, and in an unincorporated place such liberty could not commence by grant, but by ordinance, as the king may erect a fair, &c., or the like, by ordinance, without granting it unto any other. In 4 *Inst.* 48 and 49, Lord Coke, speaking of such bye laws as good in the case of mayors, bailiffs, &c., and bad in the case of elections of members of parliament, says, "If a city hath power to make ordinances, they cannot make an ordinance that a less number shall elect burgesses for the parliament than made the election before; for free elections of members of the High Court of Parliament are pro bono publico, and not to be compared to other cases of elections of mayors, bailiffs, &c., of corporations." The case of *Regina v. Larwood* only shews, that with respect to the office of sheriff, it is absolutely necessary that some person should fill it. In *Rex v. Tomlyn*, the bye law was for the election of jurats of *Maidstone*, and there was no decision upon it. In *Rex v. Spencer*, where the bye law was held bad, it was confined to the election of common councilmen of *Maidstone*. Precisely the same observation applies to *Rex v. Cutbush*. In *Rex v. Head*, the bye law was held bad, because, though it was made with the assent of the commonalty, they did not join in it; and that is the first case I find of any bye law for the election of burgesses to limit the number of the electors. In *Newling v. Francis*, the bye law applied exclusively to the election of the mayor. In *Rex v. Ashwell*, the bye law applied exclusively to the election of aldermen. In *Rex v. Holland*, the corporation consisted of an indefinite number of freemen, and a custom

was stated, by which the burgesses, until the time of *Jac.* 1, and the common councilmen afterwards, were used to admit and swear in such persons as they should think fit. Lord *Kenyon* there observed, that this gave the power to a select body, without shewing a charter granting them such a power, or even a bye law to that effect. “Not,” said he, “that I am prepared to say that such a bye law, if it had existed, would have been sufficient to have transferred the power from the body at large to a select part of it.” How powerful his mind was, we all know, and how particularly he was alive to every question of corporation law; and it is not impossible that in that case he had in his mind the distinction between filling up an office which must be filled up by somebody, and delegating the right to decide of what number an indefinite body should consist. *Rex v. Bird* seems to me the only case at all applicable to the present on this point. There the right of electing burgesses was, by a bye law of 1606, transferred from the body at large to a select body. That bye law was held good; but observe the difference between the corporation in that case, and the corporation here. There, the younger sons of freemen serving apprenticeships, whether in *Nottingham* or not, and whether to a burgess or not, and every person serving a seven years’ apprenticeship in *Nottingham* to a freeman, was entitled at the age of 21 to his freedom; and that was stated to be, fully to secure and provide for the succession of a sufficient and large number of burgesses, without the addition of any burgesses by election. The mischiefs, therefore, which may result, and in my apprehension are likely to result, from this bye law in this borough, were not likely to result there. *Dampier*, in his argument there, mentioned Lord *Kenyon*’s doubt in *Rex v. Holland*, and noticed that the right to restrain the number of electors by a bye law there recognised, in order to avoid popular confusion, seemed to have been confined to the elections of the principal annual officers of corporations, as mayors, bailiffs, &c., and was not meant to be

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extended to the general body of the corporators. That case did not, as it seems to me, admit of the strong observations which apply to this, of the tendency of the bye law to keep the number of ordinary freemen below the number of the select body, and to cut off from the freemen the power to repeal it; and though the Court held the bye law good, they had not under their consideration all the objections which arise here. Admitting, therefore, that case as an authority, to a certain extent, in favour of bye laws of this kind, it still does not, in my opinion, go the length of sanctioning the bye law in question; consequently, I think, it is still open to me to examine the validity of this bye law upon principle, and upon principle I am of opinion that it is bad. Objections to bye laws are of two kinds: first, a general want of power in the persons making them; or, second, the nature of the bye laws themselves, and a want of power to make *such* bye laws. My objection to the present bye law is of the latter kind. I think it is bad, first, because it varies the constitution of the borough; second, because it has a direct tendency to keep the number of burgesses low; and third, because in addition to the existence of an interest in many of the members who concurred in making it, it might originally have been made, and since have been continued, against the votes in the first instance, and the inclinations since, of every member of the corporation, except those interested persons; and because no case that I can find, except *Rex v. Bird*, goes further than to limit the number of electors upon the election of officers of the corporation, whereas this bye law has a tendency to limit the numbers which are to constitute the corporation itself. A bye law to regulate the election of an officer who must exist, or of any member of a definite body, is very different from a bye law to affect the question whether additional members shall exist, or not. A bye law to regulate elections which must take place, and in which the only question is, which of several candidates shall fill a particular office, does not vary

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the component parts of the corporation ; it leaves the body corporate as it found it. A bye law to affect the question whether there shall be any, and what new members, has a direct tendency to vary the component parts, and to alter the numbers of the whole body. Upon the one, the only question affected is, whether A., B., or C., shall be mayor. Upon the other, the question may be, whether there shall be five burgesses or fifty ; whether the common burgesses shall exceed the common council, or the common council the common burgesses ; whether, in short, the common burgesses shall have any vote or interest in the borough, or none. My first objection, therefore, to this bye law is, that it varies the constitution of the borough. The charter, in substance provides, that there shall be always such a number of burgesses, as the body at large shall think fit ; the bye law, that there shall be so many only, as the common council, the fifteen, shall think fit. Is not this an alteration of the constitution of the borough ? According to the charter, every burgess has a right to give his voice, whether any addition of burgesses shall be made, whether that addition shall be of five or fifty, and whether A., B., or C., shall be one. The bye law says he shall have no voice, but that the right of judging of that matter shall be in the common councilmen, and in the common councilmen only. The charter makes the burgesses equal in this respect with the members of the common council. The bye law annihilates them. The charter is for the benefit of all the burgesses of the place. The bye law in a main degree confines the benefit to the fifteen. Secondly, what is the natural tendency of a bye law such as this with respect to the number of common burgesses ? The bye law gives the power to the fifteen. Are they likely to retain that power if they can ? Have they the means of retaining it ? The corporation consists, so far as we are informed by the pleadings, of the fifteen, and of such common burgesses as they shall, from time to time, think fit to make. If any other persons had a right to become common


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burgesses, by birth, or servitude, or otherwise; and if the existence of such persons, clothed with such rights, would obviate the legal objections which apply to the bye law, upon the facts set out in the pleadings; it was for the defendant, who relies upon the bye law, to have shewn it. We can only consider the bye law with reference to the facts communicated to us by the record. According to the record, the corporation consists of the fifteen, and of such common burgesses as they may think fit. Whether there shall ever be even the fifteen or not, is entirely in the option of the common council. How, according to all human probability and experience, are they likely to exercise that option? While the number of common burgesses is less than the number of the common council, the power is exclusively in the common council; the common burgesses are comparatively ciphers. This bye law, therefore, has a direct tendency to keep the number of common burgesses below the number of the common council, because it is plainly the interest of the common council, in whom the bye law vests the power, that it should be so. Thirdly, it is an anomaly in bye laws, such as this, that the persons interested in taking power from others and vesting it in themselves, should be allowed to vote upon the question, whether it shall be so taken away and vested, or not. But how much greater the anomaly, if it is to be done by their own exclusive votes, and if by their own exclusive votes they are to be able from time to time to prevent any revocation of the bye law, and any restoration of the rights of which the common burgesses have been deprived. Then, with a view to that point, I ask, what was the number of the common burgesses, at the time when this bye law was made? Did it equal the number of the then existing common council? The record is silent upon this point. But if this is essential to the validity of the bye law, it was for the defendant, who brings forward the bye law, to have stated it. The bye law, then, for ought that appears, may have been made upon the

exclusive votes of the members of the common council, against the vote of every common burgess. With a view to the same point, I again ask, what has been the number of the common burgesses since the bye law was made? Has it ever equalled the number of the existing common council? The record is silent upon this point also; and, therefore, for ought that appears, the continuance of the bye law may have been against the wish of every person who has been a common burgess since the bye law was made. It was stated in argument that the body at large might at any time repeal the bye law; but it was forgotten to be added, that the common council might at all times prevent their so doing. The common council have only to pursue the course which their own interest dictates, namely, to keep the number of burgesses below their own number, and the body at large can never, by possibility, have power to repeal the bye law. These reasons induce me to think, that in a corporation circumstanced as this is, a bye law of this description, which is to vest in a limited number the power of saying of what number an indefinite body shall consist, is contrary to the spirit of the constitution of the borough, and is consequently bad. I am therefore of opinion, that the crown is entitled to judgment upon the demurrer to the third plea.

ABBOTT, C. J.—I agree with my three learned brothers in the opinion that judgment must be pronounced for the crown on the first part of this record; that is upon the first two special pleas, and the subsequent pleadings arising out of them. The reasons for that opinion have been sufficiently detailed by my learned brothers to render it unnecessary for me to say any thing further upon it. Upon the second part of this record two questions arise; first, whether the bye law would be good, if the charter contained no special power of making bye laws given to the select body; and second, whether by that special

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power, so given, the power of making bye laws, which would otherwise belong to the corporation at large, is taken away. Upon the first of these questions, I concur in the opinion expressed by my two learned brothers, *Litledale* and *Holroyd*, and in the reasons given by them; and which, therefore, I think it unnecessary to repeat. Upon the other question, whether the corporation at large had power, under this charter, to make this bye law, I cannot forbear saying that I have very considerable doubt. The plea sets forth the charter of *Car. 2*, and, among other things, the clause relating to the power of making bye laws. That clause is in very large and extensive terms; it mentions bye laws for the further good, and public advantage, and rule of the borough; and concludes by mentioning bye laws for other matters touching the borough, or the state, right, or interest of the same. Those terms are certainly very large, but large as they are, it is clear that they would not enable the select body to make a bye law giving to themselves that power of election, which by the charter is given to the corporation at large. This I admit, and I am aware also, that generally the body at large of every corporation possesses in itself a power of making bye laws, although not given by its charter; and that the body at large alone can exercise that power. That power is mentioned by Lord *Coke*, in the case of *Sutton's Hospital*, among other things incident to a corporation, but he speaks of it as requisite to good order and government, (of the poor in that case), and not to the essence of the corporation. If then it is incidental only as requisite to good order and government, and those objects are specially provided for, at least as to most particulars, by a power of the same nature, given to a part of the corporation, I doubt whether there is any sufficient reason for its existence in the body at large. Where no such power is given to a part, and the power is to arise from the necessity of its existence somewhere, it must be taken to

belong to the body at large; because a part, or select body, can have no power that is not expressly given, or necessarily to be inferred from the declared object of its institution. The case then seems to stand thus. A power is given to the select body to make bye laws upon all matters and causes touching the state, right, and interest of the borough. A matter is proposed in which this body cannot exercise the power, because, by so doing, they will take away from the body at large an authority which is given to them by the charter, and transfer that authority to themselves. Either, therefore, the matter proposed must be left unperformed, or a power not mentioned in the charter must be called into existence and operation to accomplish it; the matter itself not being necessary, though it may be convenient. Which of these alternatives ought the law to adopt? We have no decision to guide us. I doubt whether the law ought not to adopt that which will leave the particular directions of the charter in full and literal force. A very extensive power of making bye laws is given by the charter, and I doubt whether it may not reasonably be inferred from thence, that the king did not intend that any bye law should be made which did not fall within the scope and range of the power so given; that all other powers were intended to be excluded by the express grant of this power; and that the power thus affirmatively given to one body, carries with it a negative of all other powers to other bodies. It would be very different if a power to make bye laws on certain particular subjects had been given to the body at large; for such a power would be either superfluous or cumulative. It would be superfluous if applied to such matters only as the body at large might do by virtue of the authority incident to them; it would be cumulative if applied to matters which the incidental authority would not reach. I have thought it right to express my doubt upon this subject, but I desire to be understood as expressing doubt only, and not as pronouncing

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any opinion. The result, therefore, will be, that the judgment of the Court must be for the crown on the first and second pleas, and for the defendant on the third plea.

Judgment accordingly.

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Perjury being assigned on an affidavit made before a Master extraordinary in chancery, for the purpose of superseding a commission of bankrupt which had issued against the deponent, the indictment after stating that the commission had issued, declaring the depo-

nent a bankrupt, that such proceedings were thereupon had under and by virtue of the said commission, that the bankrupt afterwards, and whilst the commission was in force, to wit, on, &c., at, &c., came before the Master extraordinary and then and there did exhibit a certain affidavit, concerning the commission and the proceedings under the same, intitled, "In the matter of *J. D. a bankrupt*," and was then sworn thereto, and the defendant, well knowing the premises and contriving unjustly to cause the commission to be superseded, did falsely, &c., swear, &c., with an averment, "all which said matters and things so as aforesaid deposed and sworn by the said *J. D.* were and are material in the matter of the said *J. D. a bankrupt*," before the Lord Chancellor: *Quære*, whether the perjury was well assigned on the affidavit by such a general averment, without going on to aver that the affidavit had been used, or was intended to have been used in a judicial proceeding.

The word "commission," according to the context of the sentence in which it is used, may mean either the *instrument* by which authority is given to "commissioners," or the *persons* to whom the authority is given. Therefore, where in an indictment for perjury assigned on a petition to the Lord Chancellor to supersede a commission of bankrupt, the indictment, professing to set forth only the substance of the petition, stated "that at the *several meetings before the commission*, the petitioner declared openly, and in the presence and hearing of *A. B.*, an assignee," so and so, and it appearing from the petition itself, that the allegation therein was "that at the several meetings before the *commissioners*," the petitioner declared so and so:—Held, that this was not a fatal variance.

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Chancery, and then and there did exhibit and produce a certain affidavit in writing of him the said *J. D.*, of and concerning the aforesaid commission, and the proceedings had and taken under the same, intituled, “ In the matter of *John Dudman*, a bankrupt,” and that the said *J. D.* then and there in due form of law was sworn, &c., and that the said *J. D.*, well knowing the premises, &c., and also further contriving and intending, &c., and also to unjustly cause the said commission to be superseded, he the said *J. D.*, upon his oath aforesaid, in one part of his said affidavit, did, on, &c., at, &c., falsely, knowingly, wickedly, wilfully, and corruptly, depose and swear, amongst other things, in substance and to the effect following; that is to say, (setting forth the matter upon which the perjury was assigned), “ *All which said matters and things so as aforesaid deposed and sworn by the said J. D. were and are material in the matter of the said John Dudman a bankrupt, before the Right Honourable John Earl of Eldon, Lord High Chancellor of Great Britain.*” Perjury assigned upon the matter so sworn. Second count, that afterwards, to wit, on, &c., at, &c., the said defendant did prefer his certain petition in writing, “ in the matter of the said *John Dudman*, a bankrupt,” to the Lord Chancellor, and in and by his said petition, set forth, that the petitioner in *September*, 1820, purchased three horses of one *George Drowley*, for 101*l.*, to be paid for in three months by a bill at two months; that the petitioner accepted a bill for that sum, payable the latter end of *March*, 1821; that before the bill became due, *G. Drowley*, on the 17th *February*, petitioned the Lord Chancellor for a commission of bankrupt against the petitioner; that a commission issued, and that *G. Drowley*, at the opening of the said commission, proved the said debt of 101*l.* The petition, after stating various other facts, (each sentence commences with the words “ that the petitioner”) proceeded to state as follows: “ *That on the 1st of March*, 1821, the petitioner was declared a bankrupt under

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the said commission of bankrupt, and his estate and effects were seized by the messenger under the said commission; that at the *second* meeting, one *Thomas Budgen* was appointed *assignee*, and an assignment was accordingly made to him, and he possessed himself of the estate and effects of the petitioner accordingly; *that at the several meetings before the commission*, the petitioner declared openly, and in the presence and hearing of the said assignee, that the bill of exchange given for the debt due to the said *George Drowley*, was not due at the time when he struck the docket; and that the said petitioner had not committed an act of bankruptcy." The prayer of the petition was, among other things, that the commission might be superseded. Perjury assigned on the facts so stated in the petition. At the trial before *Best, C. J.*, at the last summer assizes for the county of *Sussex*, the petition presented by the defendant to the Lord Chancellor was produced in evidence, from which it appeared that the allegation in the petition was, that at the several meetings *before the commissioners*, the petitioner declared openly, and in the presence and hearing of the said assignee, that the bill of exchange given to *George Drowley*, for the debt, was not due at the time he struck the docket, whereas the indictment alleged the declaration to have been made at the several meetings *before the commission*. The defendant not having the advantage of counsel, the Lord Chief Justice thought this variance deserved consideration, and the defendant being found guilty, his lordship reserved that point, and also the question, whether the general allegation in the first count, "all which matters and things were and are material," &c., was sufficient to shew that the affidavit was sworn in the course of a judicial proceeding.

On a former day in this term, the defendant was brought up on the motion of *Gurney* to receive judgment; when the Court being informed of these points, directed that they should be argued; and at the prayer of the

defendant, *Adolphus* was assigned as counsel to argue them on his behalf; and now on this day, the case was argued accordingly.

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*Adolphus*, for the defendant. There are two objections to this indictment, the one arising upon the first count, and the other upon the second. As to the first, the objection is, that it is not averred that the affidavit on which the perjury in that count is assigned, was sworn in order to its being used in support of a petition, or that any petition was presented, or that the affidavit was exhibited in court, so as to shew that it had been, or was intended to have been used in the course of a judicial proceeding, and consequently, according to all principle and authority, an indictment so framed cannot be supported. There is here no averment or assertion on the whole record that there was any cause or matter subsisting, in which any affidavit was necessary, which could give jurisdiction to the Master extraordinary to administer the oath. The commission of bankrupt was clearly not sufficient, and in the absence of every thing else to shew that the affidavit was made in the course of a judicial proceeding, the objection is fatal. Second, as to the variance between the petition, as set out in the indictment, and that proved in evidence, it is most material. In the indictment it is stated, that at the several meetings before the *commission*, the petitioner did so and so; but when the petition itself is produced, it appears that at the several meetings before the commissioners he did so and so. Now the words *commission* and *commissioners* are not convertible terms, and they clearly do not mean one and the same thing, for the "*commission*" is the authority, or instrument under and by virtue of which the *commissioners* act; and the "*commissioners*" are the persons who so act. These two words being therefore susceptible of a totally different meaning, must, according to the distinction laid down in *Rex v. Beech* (a) upon this subject, be considered as

(a) Cited in *Rex v. May*, Doug. 194.

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establishing a fatal variance. There the court said that where the mis-recited word is susceptible of a totally different meaning, and is unintelligible as connected with the context, as for instance, where the word "air" is used for "heir," the variance is fatal; but not so where the mutilated word makes no other word—is insensible, or has no meaning attached to it in the *English* language; as "*undertood*" for "*understood* (a). Here the indictment professes to describe the contents of the petition presented by the defendant to the Lord Chancellor. That description cannot be treated as surplusage, but must be strictly proved, and as the petition produced in evidence varies from that so described, the variance is fatal.

*C. E. Law*, for the crown. The substance of the first objection, is, that the affidavit on which the perjury is assigned in the first count, is "not averred to have been used," or "intended to have been used," in a *judicial* proceeding. It is objected that here is no averment that a judicial proceeding was had or commenced. Now if the affidavit need not be used in point of fact, it need not be averred to have been used; and that it need not be used, *Rex v. Crossley* (b) is an express authority. Must it however be intended to be used, and must that intention be averred; and if averred, in what manner? Is it not apparent on the face of the indictment, that a judicial proceeding was *commenced*, to which this affidavit in question had reference? There is but one mode of superseding a commission of bankrupt, namely, before the Lord Chancellor, and in order to that object an affidavit must be sworn before a competent authority. Here the affidavit is sworn with that view, before the proper authority: the offence of perjury is complete, if ever, upon the affidavit being sworn. There must then be a competent jurisdiction to administer the oath, and the affidavit must be in furtherance of, or arising out of proceed-

(a) *Rex v. Beech*, Cowp. 229.

(b) 7 T. R. 317.

ings already commenced, or it must be the foundation of proceedings; and the jurisdiction under which the first proceeding is taken, is as complete as that under which all the subsequent steps are taken. The affidavit is a necessary step before a petition is presented, containing the alleged facts, in respect of which the court is to exercise its jurisdiction. It is a complaint on oath, detailing grounds of complaint, and the affidavit itself arises out of the proceedings under the commission of bankrupt. What is it that gives the court of Chancery, or rather the Lord Chancellor, and under him the Master extraordinary, jurisdiction? The existence of a commission of bankrupt. For the purpose of taking this affidavit, the Master extraordinary is the Court, and to him the affidavit is exhibited. The existence of a commission of bankrupt is averred, under which the defendant is averred to have been found bankrupt. It is thus that the jurisdiction arises to the Master extraordinary to take the affidavit, "In the matter of *John Dudman* a bankrupt." The defendant being averred to be such bankrupt, makes an affidavit, "in the matter of *John Dudman*," and deposes to certain matters, all which are averred to be material, "in the matter of *John Dudman* a bankrupt," a matter over which the Master extraordinary has and entertains a jurisdiction under the Lord Chancellor, expressly, because it is in a matter of bankruptcy. The affidavit is a proceeding in bankruptcy in order to supersede the commission, alleging facts with reference to the commission,—facts stated on oath, which oath the Master extraordinary is empowered to administer to the bankrupt. These facts are averred to be material in the matter in which they are sworn, namely, in a matter of bankruptcy before the Lord Chancellor. The jurisdiction therefore being complete, and the affidavit being sworn in the course of a judicial proceeding, the perjury is well assigned (a). Then as to the second objection, the

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(a) See *Rex v. Aylett*, 1 T. R. 68. *Rex v. Dowlin*, 5 T. R. 317. Stat. 23 Geo. II., c. 11, s. 1.



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indictment does not affect to set out the tenor, nor even the substance of the whole petition ; nor indeed the substance of any part continuously—but discontinuously and disjunctively. The whole matter of the petition, except the prayer, might be altogether rejected ; and then it would stand, “ that the defendant presented his certain petition, and in and by his said petition, prayed,” &c., which would be sufficient. But the word “ commission” is of doubtful meaning, and may be understood as “ *commissioners*,” upon referring to the context of the particular sentence in which it is used, when taken altogether. According to one definition given in *Johnson’s Dictionary*, it means “ a number of people joined in a trust or office.” Taking it in that sense, and attending to the context of the particular sentence, the word “ commission ” will be satisfied. In the particular sentence, it is stated, “ *that at the second meeting one Thomas Budgen was appointed assignee, and an assignment was accordingly made to him, and he the said T. Budgen possessed himself of the estate and effects of the petitioner accordingly ; that at the several meetings before the commission, the petitioner declared openly, and in the presence and hearing of the said assignee,*” &c. Two things are to be established to negative the variance, which must be a substantial variance between the word in the petition, as set forth in the indictment, and the word appearing in the petition itself when offered in evidence at the trial. Now, first, the context excludes the supposition, that by the words “ before the commission,” is meant, “ before the commission *issued* ;” and secondly, the context is not repugnant to the construction, that commission means commissioners, if the word commission is capable of that sense. That it is capable of that sense, the authority of *Johnson* is decisive, and the context excludes every other sense. The averment is, that at the *second meeting Budgen was appointed assignee*. In the particular sentence he is spoken of as *assignee*, so chosen at the *second meeting under the commission*. The meetings there-

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fore spoken of, are not meetings *before the commission issued*, but before the commissioners—before the commission, i. e. “before a number of people joined in a trust or office.”—But the word “that” is disjunctive, and therefore the matter of the petition is not set out continuously, and consequently even a substantial variance would be fatal only to the particular sentence, *Rex v. Leefe (a)*. Admitting the variance however to be substantial and fatal to the whole matter of the petition except the prayer, then rejecting the whole matter between the allegation of a petition preferred and the prayer, the allegation is “that a petition was presented, and that by the said petition the petitioner prayed, amongst other things, that the commission should be superseded;” and more need not be set forth. Whatever doubt therefore there may be on the first count, the second is free from objection, and the court may pass judgment on the defendant.

ABBOTT, C. J.—This being a criminal proceeding, if the defendant has been rightly convicted on any one count of the indictment the court may pronounce judgment; and after hearing the argument on both sides, we are all of opinion that the second count may be supported. It becomes unnecessary therefore to declare any judicial opinion as to the first. I would only say, however, of that count at present, that it is much more loose than any I have ever seen, and I hope it will not be considered hereafter as a precedent. The objection to the second count is a supposed variance between the petition set forth in the indictment and that proved at the trial. Now in a proceeding of this kind, the prosecutor does not take upon himself to set out verbatim the tenor of the petition, nor is he bound so to do (*b*). It is enough if he sets it out truly in substance and effect, and although there may be some nice and trifling variance, yet if the sense of the words used in


(a) 2 Camp. 134.

(b) See stat. 23 Geo. 2, c. 11, s. 2.

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the indictment, and of those used in the petition or other document, is clearly and unequivocally the same, he has done all that he ought, or can be required to do. The particular objection here is, that the indictment alleges that at the several meetings before the *commission*, the petitioner declared openly and in the presence and hearing of the said assignees, that the bill of exchange given to *George Drowley* for the debt was not due at the time when he struck the docket; but when the petition itself was produced, it appeared that it alleged, that at the several meetings before the *commissioners* the petitioner declared what is stated in the indictment, and the question is, whether that is a fatal variance. Now the word "commission" bears an equivocal sense and meaning. It may be used either to denote the *instrument* by which authority is given, or the *person* to whom the authority is given. If it may mean one or the other, we are to look to the context of the passage in which the words "before the commission" occur, in order to see in what sense it is to be understood. Now going back a little earlier than the place in which these words are used, we find it alleged that on the 1st *March*, 1821, the petitioner was declared a bankrupt under the said commission of bankrupt; that his estate and effects were seized by the messenger under the said commission; that at the *second* meeting one *Thomas Budgen* was appointed assignee, and an assignment was accordingly made to him, and he the said *T. B.* possessed himself of the estate and effects of the petitioner accordingly. Then come the words on which the variance arises, "that at the *several meetings before the commission* the petitioner declared openly and in the presence and hearing of the said assignee," so and so. Now if the word "commission" as there used was intended to denote the commission issued by the Lord Chancellor, it would follow that the *several meetings* would have taken place before any commission had issued;

but that cannot be, because it is impossible that before the commission issued, or before assignees were chosen, the petitioner could have declared any thing at the several meetings of the *assignees*. . The word "commission" cannot be understood as denoting the time of the transaction, because it is repugnant to the order of the proceeding set forth in the petition. Then as that cannot be the meaning of it, we must give it that other meaning, which it is admitted it may bear, namely, by construing it to mean "commissioners." There is no doubt that in common parlance, the word "commission" is on many occasions used to denote the persons in a commission, and it seems to me, that looking at the context of the passage in which it is used in this indictment, it must be read in that sense, and consequently there will be no variance. For these reasons I am of opinion there must be judgment for the crown.

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BAYLEY, J.—Mr. *Law*, who has argued this case extremely well, has satisfied my mind that the second count may be supported, and that the word "commission" must mean "commissioners." It is properly conceded by Mr. *Adolphus*, that that may be the meaning of the word. Indeed there are many cases in which it may be considered either as denoting the instrument by which an authority is given, or the persons to whom it is given, according to the meaning of other words with which it is associated. Looking at the words "meetings *before* the commission," as here used, they must be understood as referring to meetings *under* the commission, and as there can be no meetings under the commission, except *before* the *commissioners*, it is obvious that the word "before" is used synonymously with *under*, not *anterior* to the commission; and therefore "commission" may here properly mean "commissioners."

HOLROYD, J.—At first I thought this a fatal variance,

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but upon looking to the context of the passage, I now agree with the rest of the court in thinking that the word "commission" may be read "commissioners."

LITLEDALÉ, J.—Concurred.

Judgment for the crown.


Friday,
 November 25.

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 The sessions being equally divided in opinion on an appeal against an order of removal, quashed the order, instead of adjourning the appeal:—Held, that even supposing their judgment to be erroneous, a mandamus would not lie to re-hear the appeal.


The KING v. The JUSTICES of MONMOUTHSHIRE.

ON shewing cause against a rule *nisi* for a mandamus to the Justices of *Monmouthshire*, commanding them at the next sessions to cause continuances to be entered upon the appeal of the churchwardens and overseers of *St. John the Evangelist*, in the borough of *Brecon*, against an order of two justices, for the removal of *John Williams* out of *Abergavenny* in the county of *Monmouth*, to *St. John the Evangelist* in *Brecon*, and at such sessions to hear and determine the merits of the said appeal; the case disclosed on the affidavits was this:—The pauper *John Williams* having been removed by an order of two justices from *Abergavenny* to *St. John the Evangelist*, the latter parish appealed at the last *Michaelmas* sessions, and upon the hearing of the appeal, the merits and validity of the order were resolved into the question, whether the pauper had resided for forty days in the parish of *St. John the Evangelist*, under certain circumstances. Upon this question there was conflicting and contradictory evidence, whereupon the clerk of the peace, by the direction of the court, collected the opinions of all the magistrates present, and having so done, it was found that the justices were equally divided upon the question, four being on one side and four on the other. The counsel for the respondents then urged that nothing could be done in, or was affected by the appeal, and prayed that the appeal should be con-

tinued until the next sessions, but the court refused the application, and quashed the order. The affidavit against the rule for a mandamus, stated that upon the hearing of the appeal, the counsel for the appellants made two points, one of which was, that the respondents had failed in proving that the pauper had resided for forty days in the appellant parish, and that before the court proceeded to determine on the whole merits of the case, the chairman stated, that it might perhaps save the court trouble, if they first considered, (as a preliminary question), whether the residence had been proved; that on putting such question there was an equal division of the justices; that after such division the court proceeded to the question, whether the order of removal should be quashed or confirmed, and upon that question they determined without any division, and without any dissent being expressed, that the order should be quashed.

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*Scarlett* and *Maule* shewed cause. The sessions having heard and determined the appeal, this court cannot grant a mandamus to have it re-heard. There were two questions at the sessions, one of law and the other of fact. The former depended upon the latter, and that having failed in proof, the sessions properly determined that the order of removal could not be supported. This application is founded on the mistaken supposition, that this court has authority to compel the sessions to review their decision; the court has no such power. If indeed the sessions refuse to exercise their jurisdiction, and determine not to hear an appeal, this court will set them in motion by mandamus; but after they have once decided an appeal, even erroneously, their decision is final and conclusive. Had an application been made to the justices for a case, to take the opinion of this court, and a case had been granted, then undoubtedly this court would have had jurisdiction to review their determination, but not otherwise. Whether the sessions have decided right or wrong is not the question;

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but whether, after having given judgment, they can be compelled to review their decision. There is no authority to warrant such a proceeding. Here the complaint is, that after the appeal had been heard, and was ripe for decision, the magistrates made a mistake, in supposing that when they were equally divided they ought to have adjourned the appeal, instead of quashing the order. But there was no obligation on them to take that course. Assuming however that their decision was erroneous, still having in fact given judgment, they cannot be compelled by mandamus to rehear the case. *Rex v. The Justices of Leicestershire (a)*, is an authority expressly in point against this application; for it was there held, that the court will not grant a mandamus to the justices at sessions, to rehear an appeal against an order of removal after judgment given by them and entered by the clerk of the peace for quashing the order, upon the ground that the justices at sessions were divided in opinion, and that the judgment was entered by mistake, instead of an adjournment of the appeal. The case of *Rex v. The Justices of Westmoreland (b)*, does not militate against this decision. There the justices being equally divided, neither gave judgment nor adjourned, and on an application for a mandamus, though the court intimated an opinion in its favour, nothing was done; but even if a mandamus had actually been granted, it would only go to shew that the court would compel the sessions to proceed to judgment in an appeal which they had begun to hear, and neglected to go on with. The case of *Bodmin v. Warlingen (c)*, is equally inconclusive as an authority in favour of the present application. In that case the justices being equally divided, they neither made an order or adjourned the appeal, and at a subsequent sessions having quashed the order of removal, this court afterwards quashed the order of sessions, solely on the ground that it was made without an adjournment.

(a) 1 M. & S. 442.

(b) *Mic.* 23, G. 2. Bott. 734, 5th ed.

(c) Bott. 733.

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But this case only goes to shew that a subsequent sessions had no jurisdiction over an appeal to a previous sessions, unless the appeal has been adjourned ; but it does not follow from thence that if the former sessions had determined the case, though equally divided, this court would have disturbed its decision. Neither of these cases therefore affords any ground for the present application, though both will probably be relied on by the other side. If countenance is given to this application, the result will be, that in every case where the sessions are supposed to have come to a wrong decision, a mandamus will be sought for to compel them to review their decision. The court will, however, feel no disposition to attract to it such an extensive branch of jurisdiction, or give encouragement to a novelty which is neither founded in principle or authority.


*Watson* contrà. In Mr. *Nolan's Treatise on the Poor Laws*(a), a work of considerable authority, it is laid down that " If the magistrates, who have a right to join in the court's determination, should be equally divided in opinion, no judgment can be given, for all judges of the same court are of equal authority; and there is no such thing as a casting vote. Unless something farther is done, the direct result must be to frustrate the intention of the legislature in giving an appeal to the sessions. For the subject of appeal, if a rate, would continue unaltered, if an order of removal would remain in force. To avoid such mischief, the justices must adjourn the appeal from session to session, if necessary, until a majority shall be of opinion either on one side or the other;" and in the note upon this passage it is said, " This seems to be their bounden duty. For otherwise the court will grant a mandamus to compel them to enter continuances, and hear the appeal at a subsequent sessions," and *Rex v. Westmoreland*(b), and *Bodmin v. Warlingen*(c), are cited. In the last-mentioned case it was expressly laid down, that if the justices are

(a) 2 Nolan, P. L. 536, 4th ed.

(b) 2 Sess. Cas. 352.

(c) 2 Bott. 726.




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equally divided in opinion, that was a sufficient warrant for the clerk of the peace to have entered an adjournment, and it was his duty to have done so; and *Rex v. Westmoreland* went upon the principle, that unless an adjournment took place there might be a failure of justice. This case comes expressly within the principle of those decisions, which have hitherto always been considered as the rule of government in sessions practice, whenever there is a division of opinion on the bench. The case of *Rex v. The Justices of Leicestershire* (a), does not decide the present case. That was a rule calling on the justices to rehear an appeal, judgment having been given by mistake on a miscalculation of votes; and though the rule for a mandamus was discharged, yet Lord *Ellenborough* said, "If any error was made in the entry of the clerk of the peace, that error should have been pointed out at the sessions, while the court was sitting and competent to reform its own errors, and to draw out a more correct judgment. The party who would have corrected the error should have applied to the proper forum and in due time; and if it had been found *that the numbers were equal, nothing would have been done upon it, for it would have been a nullity*; but here no step of that sort was taken, but judgment was entered:" and *Le Blanc*, J., said, "No application was made to the court below while sitting, to sift or inquire into the error, if any such existed; but application is made to this court to institute an inquiry upon the question how the numbers were composed at the time when judgment was pronounced." In the present case there is nothing on the affidavits to warrant the justices in the judgment pronounced, and as this application is made to prevent a failure of justice, there is nothing in principle which can prevent its success.

ABBOTT, C. J.—I am of opinion, that the rule nisi for a mandamus must be discharged. In this case the justices at quarter sessions have actually given judgment upon

(a) 1 M. & S. 442.

the appeal. We are not a court of error, to review their decision. Where the sessions forbear to give any judgment at all, this court will interpose to compel them to go on and pronounce judgment; but where they have actually given judgment, even under a mistake of law, this court has never yet interposed to disturb their decision. In form, this is an application to enter continuances and hear and determine the appeal; but it is in substance an application to expunge the proceedings which the justices have already taken. If we were to grant this application, we should be opening a door to continued litigation and enormous expense, in every case where the propriety of the decision of justices at sessions might be questioned, either on the ground of mistake in law or fact. There seems to be no authority for such a proceeding, and as our predecessors have not recognised its propriety, we are certainly not disposed to take a step which is so pregnant with mischievous consequences.

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BAYLEY, J.—I am of the same opinion. If an application had been made to the sessions for, and they had granted, a case for our opinion as to the propriety of quashing the order under the circumstances stated, we should have considered the question; but the sessions having decided the case, and quashed the order; we are not at liberty to consider whether they have done right or wrong.

HOLROYD, J., concurred (a).

Rule discharged.

(a) *Littledale*, J., was gone to chambers.

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Actual residence in the parish is essential to impose upon the occupier of property the burden of serving the office of constable.

## The KING v. J. ADLARD.

THIS was an indictment against the defendant for refusing to serve the office of constable. The first count stated, that defendant was an inhabitant *and residing* within the parish of *Saint Bartholomew the Great* in *London*, and able and liable to serve the office of constable for the said parish; that he was duly elected and appointed to be one of the constables for the said parish; and that he neglected and refused to take upon himself the execution of the said office. Second count, similar, only omitting the words "and residing." Plea, not guilty. At the trial before *Abbott, C. J.*, at the *London* adjourned sittings after *Easter* term, 1824, a verdict of guilty was found, subject to the opinion of the court upon the following case.—

The defendant, on the 22d of *December*, 1823, and for several years preceding, occupied under a lease at a yearly rent of 55*l.*, certain premises in *Great Saint Bartholomew Close*, in the parish of *Saint Bartholomew the Great*, and he continued to occupy them from thence till the time of the trial, but lived in an adjoining parish, two or three yards out of the parish of *Saint Bartholomew the Great*. For the premises so occupied by the defendant in *Saint Bartholomew the Great*, he was assessed in that parish at 25*l.* per annum, and paid the church and poor rate, and all other parish and other rates in that parish. Upon these premises the defendant carried on the trade of a printer, employing in such trade a considerable number of men, and the defendant himself, for the purposes of his trade, was in the habit of resorting to the premises on working days, and attending there from an early hour in the morning till a late hour in the evening, and at some times he remained there through the night at work; but neither the defendant, nor any other person slept on the premises, which were in no way calculated for a dwelling-house,

being fitted up only as a counting-house, printing-offices, and warehouses. The defendant, on the 22d of *December*, 1823, was duly chosen one of the constables for the said parish for the year ensuing. The defendant refused to take upon himself the office, alleging that he was not liable to serve the same, on the ground that no person slept on the premises occupied by him within the parish of *Saint Bartholomew the Great*. The question for the opinion of the Court is, whether the defendant, under the circumstances stated in the case, is an inhabitant of the said parish, and liable to serve the office of constable.

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*Bolland*, for the prosecution. The two cases of *Rex v. Hall*(a), and *Rex v. Poynder*(b), go a certain length towards determining the question here raised, but they do not decide that a person who merely occupies premises, without sleeping there by himself or his servants, is to be considered as an *inhabitant* of a parish. The object therefore of stating this case for the opinion of the court, is to determine whether, under the circumstances found, it is not equally the duty of the defendant to serve the office of constable, whether it imposes a burden or confers a privilege on him. In *Rex v. Hall*, the party sought a benefit; in *Rex v. Poynder* the object was to impose a burden; but both cases were decided on the same principle, namely, that whether a privilege was conferred or a burden imposed, the duty attached. Undoubtedly those cases turned upon the meaning of the word "householder." Here the question is, whether the defendant is an "inhabitant" of the parish, and liable to serve the office of constable. Upon examination, it will be found that in older times the word "inhabitant" was used in the same sense as it is at the present day; and without going into the obscure history of the custom of electing constables, it will be sufficient to state some authorities to shew that this defendant

(a) Ante, vol. ii. 241. 1 B. & C. 123, S. C.


(b) Id. 258. 1 B. & C. 178, S. C.

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must be considered as an inhabitant of the parish in which his premises are situate, and that in respect of such inhabitancy he is liable to serve this office. Lord *Coke*, in his reading on the Statute of Bridges(*a*), which imposes the burden of repairing bridges on the inhabitants of the shire, says, "The word *inhabitants* is the largest of the kind; for although a man be dwelling in a house in a foreign county, riding, city, or town corporate, yet if he hath lands or tenements in his own possession and manurance in the county, riding, city, or town corporate, where the decayed bridge is, he is an inhabitant both where his person dwelleth, and where he hath lands or tenements in his own possession, within the statute." It may fairly be deduced from this authority, that so far at least as pecuniary burdens are concerned, it is not necessary that a man should actually dwell in a parish in order to render him a rateable inhabitant thereof. Upon the same principle it is submitted, that the burden of serving offices equally attaches though the inhabitant does not actually sleep in the parish. The office may be served by a paid deputy, and therefore it stands on the same footing as a pecuniary burden. In *Griesley's case*(*b*), one *Kingston* being an inhabitant within the manor of *Kingston*, in the county of *Stafford*, was according to the custom chosen to be a constable, and having refused to serve the office, he was fined by the steward; and the questions raised were, first, whether the steward might impose a fine in such case; second, whether the fine ought to be enforced or not; and, third, whether the lord of the leet might distrain for such fine, without a custom enabling him so to do. Lord *Coke*, in commenting on that case, says, "Note, reader, the said custom, &c., eligere unum idoneum hominem de inhabitantibus infra manerium ad essendum constabularium," &c. well agrees with the law; for the common law requires that every constable should be idoneus homo, i. e. apt and fit to execute the said office; and he is said in law to be


(*a*) 2 Inst. 702.

(*b*) 8 Rep. 38.

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idoneus, who has those three things, honesty, knowledge, and ability; honesty to execute his office truly, without malice, affection, or partiality; knowledge to know what he ought duly to do; and ability, as well in estate as in body, that he may intend and execute his office, when need is, diligently," &c. From this it should seem that sleeping in a parish is not necessary to render a man qualified to serve the office of constable, for if he be idoneus homo in the sense given to the words by Lord Coke, he need not be actually resident in the parish. The doctrine laid down in *Jeffrey's case* (a) is also strong to the present purpose. In that case, *Jeffrey* had been libelled in the spiritual court for church rates in respect of lands occupied by him in the parish of *Haylesham*, in the county of *Sussex*, he residing in another parish, and having declared in prohibition, the question was whether he was liable to contribute to the church rates of a parish in which he did not dwell, and the court answered and resolved, "that although the house wherein *Jeffrey* dwelt be in another parish, yet forasmuch as he had lands in the parish of *Haylesham* in his proper possession and manurance, he is in law *parochianus de Haylesham*. For the place where he lies, sleeps, or eats, doth not make him parishioner only, but also forasmuch as he manures lands in *Haylesham*, and by that is *resident* upon it, that makes him a parishioner of *Haylesham* also as to this purpose." It was also said, "In this case the charge is on the *person*, and not on the land, but is on the person in respect of the land for the more equality and indifferency." From this case, therefore, it is clear, and cannot be controverted, that a person is bound to pay parish burdens imposed upon him in the character of occupier of lands, although he does not actually reside, and from thence it would seem to follow as a necessary inference that he is equally liable to be called upon to serve parish offices. This principle has been adopted in the late cases of *Rex v. Hall* and *Rex v. Poynder*,

(a) 5 Rep. 66.

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in the latter of which one of the non-resident partners in a trading firm was held liable to serve the office of overseer, as a householder within the meaning of the 43 *Eliz.* c. 2. So in *Rex v. Clapp(a)*, it was held that a person occupying lands within a parish is compellable to receive a parish apprentice, though he do not reside within such parish. Again, in *Rex v. Tunstead and Happing Hundreds(b)*, although it is enacted by 20 *Geo.* 3, c. 36, relative to the binding of poor apprentices within particular incorporated districts, that no person shall be bound to receive any such apprentice, unless he be an *inhabitant and occupier* in the parish where such child lives, it was held not necessary that the master should actually reside in the parish; if he be an occupier there it is sufficient; for *inhabitant* and *occupier* are for this purpose synonymous terms. It will probably be urged on the other side, that as an indictment for burglary would not lie for breaking and entering the defendant's premises, so he cannot be considered as an inhabitant of the parish. That, however, is a very fallacious test, as respects the present question, for though it may be true that this cannot be considered as the defendant's dwelling for the purpose of maintaining an indictment for burglary, (which stands upon a totally different principle), yet it does not follow from thence that he is not to be considered an inhabitant for the purpose of serving parish offices. He is clearly, as a parishioner, liable to all parochial pecuniary burdens, and à multo fortiori he is liable to serve the office of constable in turn with other parishioners. The office of constable concerns the protection of property and the preservation of peace in the parish. The defendant has an equal interest with other parishioners in these objects, and his obligations ought to be mutual and co-equal with his neighbours. He is "idoneus homo" whether he sleeps in the parish or not, and therefore there is no more reason why he should be

(a) 3 T. R. 107. See *Rex v. Barwick*, 7 T. R. 33.

(b) 3 T. R. 523.


exempt than any other parishioner who happens to dwell in the parish.

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Brougham, contra. The cases cited on the other side do not bear upon the present question, because in each taxable property was the foundation on which it proceeded, and not the personal residence of the party in the parish. In *Rex v. Hall* the question arose upon the qualification of householders to act as commissioners of the court of Requests in the city of *Bristol*, and there it was held that persons being householders were qualified to act as commissioners, although they did not personally reside. Again, in *Rex v. Poynder*, the only question was, whether the defendant, who occupied a house in one parish by means of a clerk only, and paying rent, rates, and taxes, but sleeping in another parish, was a substantial householder within the meaning of the 43 *Eliz. c. 2*, and liable to serve the office of overseer of the poor in the first-mentioned parish. Both those cases turned upon the meaning of the word "householder," and not upon the word "inhabitant." The argument on the other side is attempted to be supported by disregarding the distinction between the liability to bear pecuniary burdens in respect of property locally situate within the parish, and the liability to serve a personal office which can only attach where the party is personally resident, without any regard whatever to property. The reference to Lord *Coke's* note to *Griesley's* case (a), does not help the argument. That note is referred to only for the sake of that learned writer's exposition of the word "idoneus;" but upon looking to the case itself, it appears that the lord prescribed to hold a court leet, "de omnibus inhabitantibus et residentibus" within the manor, and the custom was to chuse an inhabitant. It is clear that Lord *Coke*, in his note to the case, considers "inhabitants" and "resiants" as synonymous terms, and in *Com. Dig. tit. Lect. M. 6*, that case is cited to shew, that the leet may

(a) 8 Rep. 38.

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prescribe to elect one of the *resiants* constable. *Jeffrey's* case regards solely a church rate, and the only question was, whether the party was liable to be assessed to the church rate though not an inhabitant, and he was held liable upon a totally different ground from that on which this case must rest, namely, that having property in the parish, he was liable to pay a church rate in respect of such property. It does not necessarily follow, that he would also be liable to serve the office of constable; for a man may very well be liable to pay a pecuniary burden, and yet not be bound to serve a personal office. Though Lord *Coke*, in his commentary on the Statute of Bridges^(a), gives the word "inhabitant" exactly the sense which it is now contended on the part of the defendant it ought to have; yet there is one part of his commentary which could hardly be borne out by any reasonable intendment so as to satisfy a prosecution of this nature. In the first place he says with great propriety, "ex vi termini, every person that dwelleth in any shire, riding, city or town corporate, though he hath but a personal residence, yet is he said in law to be an inhabitant, or a dweller there, as servants," &c. He then goes on to say, "every corporation and body politic residing in any county, &c., or having lands or tenements in any shire, &c., quæ propriis manibus et sumptibus possident et habent, are said to be inhabitants there within the purview of this statute." Now it is clear that a body corporate could not be said to be inhabitants within the scope of this indictment. It is clear that their liability to pay county rates, can only attach in respect of their occupation of lands, &c., and therefore the word "inhabitant" cannot have the large sense in which it is used on the other side. As respects the liability to pay rates in respect of property, a person may well be said to be an inhabitant, though he does not personally reside, and it is in that limited sense that the word must be taken, as put in Lord *Coke's* commentary on the Statute of Bridges. The

(a) 2 Inst. 702.

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case of *Rex v. Clapp* rests on the same footing, for there the defendant was held liable to take a parish apprentice in respect of his property in the parish, and so of the case of *Rex v. Tunstead and Happing*. For the purpose of the present case, the word "inhabitant" must be taken as synonymous with "resiant," and therefore a person who is not personally resident within a parish, is not bound to serve the office of constable. This construction will be borne out by a reference to the manner in which parish constables were originally chosen. In *Com. Dig. tit. Leet. M. 6*, it is said that the petit constable is an officer at common law, and his election belongs to the leet, and properly to the homage there, 4 *Inst.* 265. 2 *Jon.* 212. 1 *Sal.* 175. As resiants only are liable to do suit and service at the leet, it follows that resiants only can be chosen constables. In *Hawk. P. C.*, B. 2, c. 10, s. 12, it is said, "It seems clear that by the common law, as well as the statute of *Marlbridge*, c. 10, no man can be obliged to do suit to any such court, within the precincts whereof he doth not reside, in respect of any lands which he may have within the jurisdiction of it; for that no suit of this kind is due in respect of the tenure of any lands, but only in respect of the *personal residence* of the party. And if a man have a house which stands upon the precincts of two leets, it is said, that he shall do his suit to the court, within the jurisdiction of which his bed-chamber lies (a)." This is decisive to shew, that as resiants only are bound to attend the leet, and as constables are to be chosen by that court, they must be chosen from among the resiants, inasmuch as the court has no jurisdiction over other persons than resiants. At common law, it is said in Lord *Bacon's Treatise on the Office of Constable* (b), that the petit constables in towns ought to be of the better sort of *resiants* in the same. In *Prouse's* case (c), an attorney of the King's Bench was elected tithing-man of *Taunton*, in which town a custom was pre-

(a) 2 *Inst.* 122. *Dalt. Sher.* 387. (b) *Bacon's Works*, 4 vol. 311.

(c) *Cro. Car.* 389.

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tended to be, "that every one shall be a constable or tithing-man according to their several houses," but the court held that this could not be a good custom, "for then a woman, being an inhabitant in one of the said houses, it may come to be her course to be constable, which the law will not permit." By the 29 Geo. 2, c. 25, an act for appointing a sufficient number of constables for the service of the city and liberty of *Westminster*, part of the qualification of the party called upon to serve the office is, that he shall be *resident* within the city and liberty. This is a legislative recognition of the principle that no person is liable to serve the office of constable unless he is a resident within the parish. If the mere possession or occupation of property in a parish, is to entail the burden of serving the office of constable upon the occupant, the principle might be carried to an unlimited extent. The occupier of a warehouse, cowshed, or of any minute interest in land would be equally liable, because he might happen to fall within the definition of an inhabitant. But such a principle would be pregnant with absurdity, and lead to the greatest inconvenience. Residence is essential to the qualification; and as this defendant is not a resident inhabitant, he is clearly not liable.

The case was argued on a former day in this term, when the court took time to consider of it; and judgment was now delivered by

ABBOTT, C. J.—The question in this case is, whether the defendant is legally liable to serve the office of constable, and the facts stated in the special case raise the question, whether the occupier of a tenement, situate within a parish, but not used as a dwelling-house, is an inhabitant, and as such liable to serve this office. The question is the same, whether the tenement consist of house or land, and whether its value be more or less. It has been contended on the part of the prosecution, that such an occupier is an

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inhabitant of the parish within which the tenement is situate; and for many purposes he certainly is. The word inhabitant, however, like many others, varies in its import according to the subject-matter to which it is applied. For all the purposes of pecuniary charge it may be laid down, that such an occupier is an inhabitant, and therefore that he is liable to church rates, to which all inhabitants are by law to contribute, to the repairs of highways by common law, and to the repairs of bridges, if not by common law, at least by the statute 22 *Hen.* 8, c. 5. My Lord *Coke*, in his commentary upon that statute, says, that the word inhabitant is the largest word of its kind, and that all occupiers are inhabitants within the meaning of the statute: but he adds, “that servants are not within the statute (a).” The poor laws I do not mention, because the statute of *Eliz.* contains the word occupiers as well as the word inhabitants. But, as was justly remarked on the part of the defendant, in all these cases the object is to raise a sum of money by the assessment of the property within the parish; and for the purpose of that assessment, it is perfectly immaterial whether the occupier is a resident within the parish or not: consequently, for such a purpose a non-resident occupier may fairly enough be deemed an inhabitant, where that word happens to be the only mode of description applied to the individuals who are to bear the burden. The office of constable is of a very different character. It is a personal, not a pecuniary office, and must be performed by personal attendance within the parish. The personal presence of the constable is indispensable, for he is presumed to be known to all the inhabitants of the parish, and they are all bound to obey his orders, and to aid and assist him, whenever called upon, in the exercise of his lawful authority. In ancient times, constables were appointed at the leet or view of frankpledge, and in some places they are so still; though since the disuse of that court other modes of appointment have

(a) 2 *Inst.* 702.

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been introduced, and adopted pretty generally. Now the view of frank-pledge is a view of the resiants within the leet, and is spoken of as such in almost all books. In alleging a prescription for a leet, the regular form is to describe it as a view of frank-pledge of all the inhabitants and resiants within the parish ; and even where the word inhabitant only is used, as in *Griesley's* case (a), it is evidently used in the sense of resiant. The statute of *Marlbridge* (b), speaking of the sheriff's tourns, enacts, that those who have tenements in diverse hundreds need not attend the tourns, except in the bailiwicks wherein they are conversant ; and my Lord *Coke*, in his commentary thereon (c), says, " if a man hath a house within two leets, he shall be taken to be conversant where his bed is." That is a direct authority for saying that an inhabitant, with reference to the view of frank-pledge, does not mean an occupier ; nor can the word, indeed, have that meaning ; for all males above the age of twelve years were bound to attend and do suit and service, many of whom could not possibly be occupiers, and if occupiers, as such, were not members of the leet, nor bound to do suit and service there, it seems to follow, necessarily, that the court could not compel them to serve this office. But, it has been said, a non-resident occupier may be appointed to this office, because he may serve it by deputy. I do not know that the appointee can make a deputy of his own right, without the sanction of some higher authority. But, even if he can, it by no means follows that he is compellable to serve an office which in its very nature requires personal services, especially when no necessity for his appointment is shewn to exist. We are therefore of opinion, that the verdict found at the trial was wrong, and must be set aside, and a verdict entered for the defendant.

Judgment for the defendant.

(a) 8 Rep. 76.

(b) c. 10.

(c) 2 Inst. 122.


The KING v. The BENCHERS of LINCOLN'S INN.
Mr. WOOLLER'S case.

1825.

Saturday,
November 26.

THIS was an application for a rule calling on the masters, treasurers, and benchers, of the Honorable Society of *Lincoln's Inn*, to shew cause why a writ of mandamus should not issue to them, commanding them to admit *Thomas Jonathan Wooller*, gentleman, as a student of their Honorable Society, in order to qualify himself for the purpose of being ultimately called to the bar. The affidavit on which the application was founded, stated that in the early part of *Michaelmas* term, 1824, deponent did in the usual form and manner apply to the Honorable Society of *Lincoln's Inn*, to be admitted a student, for the purpose of qualifying himself for an observance of the rules and regulations of the said society, for being ultimately called to the bar. That upon making such application, deponent was informed by the steward of the society, or by the clerk then being in the steward's office, and acting for him, that his application was correctly made in point of form, and that by calling again in a few days on the steward, deponent would be informed of the result of his application. That a few days afterwards he accordingly called on the steward for that purpose, and was informed by him that the consideration of deponent's application was postponed until the last day of said *Michaelmas* term, but the said steward stated to deponent that he was ignorant of the reason of such postponement. That after the end of *Michaelmas* term, deponent again inquired of the steward the result of deponent's application, and was again verbally informed by him, that another postponement of the consideration of his application had been made by the society, to some certain council day, to be held between *Michaelmas* term and the *Hilary* term next ensuing. That after that council day

Mandamus does not lie to the benchers of an inn of court, to compel them to admit an individual to be a member of the society, for the purpose of qualifying himself to become a barrister.

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had passed, deponent again waited upon the steward of the inn, and was informed that the consideration of his application had been further postponed until the first day of the then ensuing and now last *Hilary* term, and the said steward in answer to the inquiry as to the reasons of such postponement, informed deponent, that he, the steward, was not then acquainted with the cause of such postponement, and was not then able to ascertain what minute had been made by the Masters of the bench in council. That deponent subsequently applied to the steward, and was informed by him that the postponement had been made for the purpose of making inquiries into the circumstances of an application made by deponent to be admitted a member of the Honorable Society of *Gray's Inn*. That on the second day of *Hilary* term last past, deponent was informed verbally by the steward, that his application had been rejected, but that he was ignorant of the reasons for such rejection. That in consequence thereof, deponent addressed a letter to the treasurer of the society, requesting to be informed of the reasons which had induced the rejection of his application, and shortly afterwards received an official letter from the steward, as follows :

“ Steward's Office, *Lincoln's Inn*,
 “ *January 27th*, 1825.

“ SIR,

“ I am directed by the treasurer and masters of the bench of *Lincoln's Inn*, to inclose you copy of an order made upon your application to be admitted a member of that society, I am,” &c.

That such letter inclosed a paper purporting to be the copy of an order made by the society as follows :—

“ *Lincoln's Inn*,

“ At a council there held, the 24th day of *January*, 1825. On further consideration of the application of Mr. *Thomas Jonathan Wooller*, for admission to this society; ordered, that a letter be written by the steward to Mr. *Wooller*, to inform him that his application for

admission to the society of *Lincoln's Inn*, was rejected by the treasurer and masters of the bench in council this day."

That such letter and paper do not communicate to deponent the reasons of the rejection of his application; that deponent was not heard by the said society, nor was any intimation made by or on its behalf to deponent, of any objection, or of any point upon which it was wished, or was desirable deponent should give further satisfaction, or information of any kind. That deponent was always willing to afford any information or evidence as to deponent's character and conduct. That feeling confident of the integrity of his character, and the rectitude of his conduct through life, and being anxious to meet any imputation or suspicion existing against him, if the means of so doing were furnished to him, and with a view to obtain a knowledge of the grounds upon which his application had been rejected; he, on the 27th *January* last, presented a petition to the Honorable Society as follows:—

"That your petitioner, in consequence of an application made by him to be admitted a student of *Lincoln's Inn*, has received a letter from Mr. *Lane*, the steward of the said inn, inclosing what purports to be an order of the council of the said inn, held on the 24th of *January* instant, stating that the application of your petitioner was rejected, but not assigning any cause for such rejection. Your petitioner believing that the branches of the profession of the law, which require an admission to one of the four inns of court, are open to the honest ambition of all his majesty's subjects, not rendered ineligible in consequence of moral character or specifically disabled by some express and known regulation, and being satisfied that no such moral disqualification can be substantiated against him, and further, being utterly ignorant of any legal disability that could affect the question of his admission, feels confident that the treasurer and masters of the bench of this honorable society have been misled by some misrepresentation of circumstances or perversion of facts into

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a decision which their better informed judgments could not have pronounced. Your petitioner speaks thus confidently because he is convinced that no moral accusation can be even produced against him, and he feels satisfied that no legal impediment can be assigned; but he is aware that many may mistakingly suppose it their interest to misrepresent him, and that the prejudices of others may have been thrown into the scale to make it preponderate on the side of injustice. To such causes only can your petitioner attribute a result so much at variance with the acknowledged liberality of the Honorable Society of Lincoln's Inn. Your petitioner therefore feels emboldened to request of the treasurer and masters of the bench, the "reasons" which have induced them to reject his application, and an opportunity of defending himself against whatever misrepresentation may have been made. Your petitioner ventures to hope that this request is too reasonable to be denied, and too just to be evaded. There can be no desire on the part of the treasurer and masters of the bench of the Honorable Society of Lincoln's Inn, to establish an arbitrary tribunal deciding with closed doors and without allowing the victims of such authority the slightest intimation of what may be advanced against them. The consequences would be too monstrous, and might at once close the doors of the profession alluded to against all but the "chosen few" of a small number of absolute dictators. If one inn of court assumes the right of refusing to admit individuals without assigning any cause the same power may be claimed by all the inns of court, and as they are the portals through which the students must necessarily pass, a number of individuals not much exceeding one hundred would have the power of creating a *caste* of professionals, and of denying to the subjects of the realm at large, the privileges which have been deemed a common and general right of all individuals of fair fame and honest reputation. Your petitioner does not suspect the treasurer and masters of the bench of this honorable

society of any design to claim or exercise generally any such authority; but the principle being admitted, that the power to reject without assigning a reason exists, there is no longer any security against the abuse, nor any remedy remaining to correct the mischief. Did the question only affect the interest and rights of your petitioner, he would feel bound by a sense of duty to himself, and to that reputation which he would preserve unsullied, to press upon the treasurer and masters of the bench of this honorable society, the propriety and justice of granting his urgent prayer; but he feels that a still more imperious and paramount duty urges him forward to resist the establishment of a precedent which in addition to the comparatively minor evil of destroying the prospects of an individual, may affect the interests of thousands of his fellow countrymen in the ages yet to come; and therefore in the most earnest manner, and by the sacred name of that justice of which law should be the helpmate and handmaid, he implores that his case may be re-considered, that his accusers may be produced, that the scope and tenor of his whole life may be scrutinized in the most rigid manner, and then, whatever may be the result, the justice of the case may be satisfied by a full hearing and an honest exposition of the reasons that should influence the decision. Your petitioner would not have gone at this length into the subject, but that an application to the treasurer for the reasons which produced the rejection has been unavailing. Your petitioner therefore deemed it necessary to appeal to the society for what the treasurer might not feel authorized as an individual to grant. Your petitioner fervently hopes, that this his earnest prayer may be taken into your earliest and candid consideration, and that such redress may be granted to him as the justice of what he is led to believe is an unprecedented case may require at your hands. And," &c.

That this petition was duly presented to the said society, and deponent received from the steward in the interim

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between the *Hilary* and *Easter* terms last past, a verbal answer that it had been taken into consideration, but that no order had been made thereon; and deponent saith that he hath been unable to obtain, and has not since received any other answer thereto. That deponent thereupon despairing of obtaining a hearing by said society, did, on the 9th of *April* last, address a petition to The Right Honorable the Lord Chief Justice of the court of *King's Bench*, the Chief Justice of the court of *Common Pleas*, the Chief Baron of the court of *Exchequer*, and their brother justices, recapitulating the circumstances hereinbefore stated, and embodying therein the aforesaid petition to the treasurer and masters of the bench, and praying their lordships, as visitors of the said inn of court, that the said masters of the bench might be forthwith requested to certify to their lordships the objections to deponent's applications to be admitted a student of said society, and that their lordship's would appoint some day for hearing deponent either in his person or by his counsel, in appeal against such objections, and to make such order in the matter as to their lordships' judgment his case might appear to merit. That to deponent's great regret, he received the following note from the clerk of the Right Honorable the Lord Chief Justice :—

Serjeants' Inn, *April* 30th, 1825.

"SIR,

The Chief Justice has directed me to inform you that the judges have no power to interfere on the present occasion." I am, &c.

That it appearing from the said note that their lordships the judges had no power to interfere, deponent renewed his application to the said society, by a second petition, dated 17th of *May*, 1825, praying a re-consideration of his case, and an opportunity of being heard. [This second petition was set forth in the affidavit]. That such petition was duly presented to the said society. That in order to remove any doubts as to deponent's fitness

to be admitted as student of said inn, deponent wrote and sent to such of the masters of the bench whose residences he could discover at the time, a letter dated 12th of *May*, 1825, offering to give the most satisfactory evidence of the rectitude of his general character and conduct. [This letter was also set forth in the affidavit]. That such letter was sent by deponent, and he believes that the same was received by the greater number of the masters of the bench of the said society, before the day appointed for the consideration of the second petition of deponent; and on the 17th of *May*, deponent received the following note from the steward:—

“SIR,

Your petition dated the 13th of *May*, 1825, was taken into consideration by the benchers of Lincoln's Inn, at a general council, and was rejected.” I am, &c.


That no objection has at any time been made to deponent of any want of form in his several applications; that no reasons for the rejection of his applications have up to this time been communicated to him; that deponent believes such refusal of said society to admit this deponent a student of the said inn, and to assign reasons for so doing, to be contrary to law. That such refusal has been productive of serious injury to deponent, and he is still sustaining great loss and injury thereby, and that founding his belief upon the said note so written by the order of the Right Honorable the Lord Chief Justice, this deponent believes that he is without other legal remedy against the said society than by applying to his majesty's court of King's Bench for a proper writ of mandamus.

The *Court* having on a former day suggested that there was some doubt as to its jurisdiction to entertain such an application:

Mr. *Wooller*, in person, now addressed himself to that point. There being no other legal mode of redress open to a party under circumstances like the present, it should

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seem, upon general principles, without any express decision upon the subject, that the writ of mandamus is the proper remedy to enforce the right of admission now claimed. If it cannot be denied that the branches of the profession of the law, which require an admission to one of the four inns of court, are open to the honest ambition of all his majesty's subjects not ineligible from moral character, or disabled by some express and known regulation, the individual now applying has at least such an inchoate right of admission, as this Court will enforce by mandamus. Unless this principle be admitted, it will be in the power of the inns of court to exclude a large portion of society from those privileges which the king's subjects are entitled, *sub modo*, to enjoy; and these learned bodies will be left to exercise an irresponsible jurisdiction which is no where assumed by any known public institution in this kingdom. No decided case is to be found expressly in point with the present, (which may well be accounted for by reason that the right now contended for has never been questioned), but there are cases which recognize the principle upon which this application must be supported. In *Rex v. The Benchers of Gray's Inn* (a), an application was made for a mandamus to be directed to the benchers of Gray's Inn, to compel them to call a Mr. *William Hart* to the degree of a barrister at law, he being a member of the society, and having conformed to the regulations thereof. Undoubtedly the court in that case refused the writ, but it was expressly on the ground that there was another mode of relief open to the party, namely, by appeal to the twelve judges, as visitors of the society. The question having been debated at bar, the court took time to consider whether they should grant a rule to shew cause, and afterwards Lord *Mansfield*, in delivering the judgment, said, "We have consulted the other judges on the subject of this application, and I am prepared to state the result. The original institution of the inns of court

(a) Doug. 339.

no where precisely appears, but it is certain that they are not corporations, and have no constitution by charters from the crown. They are voluntary societies, which for ages have submitted to government, analogous to other seminaries of learning. But all the power they have, concerning the admission to the bar, is delegated to them from the judges, and in every instance their conduct is subject to their control as visitors. From the first traces of their existence to this day, no example can be found of an interposition by the courts of *Westminster Hall* proceeding according to the general law of the land; but the judges have acted as in a domestic forum. The only case in which an attempt was made to proceed in this Court, is reported in *March*. One *Booreman*, a barrister of one of the *Temples*, having been expelled, he applied for his writ of restitution, but it was denied, ‘because there is none in the inn of court to whom the writ can be directed, for it is no body corporate, but only a voluntary society, and submitting to government; and the ancient and usual way of redress for any grievance in the inns of court was by appealing to the judges.’ I do not take the first reason stated in *March* to be the true one. It is not solid. The second is the true reason. As to the first, the inns of court had regulations; they acted and were known as a body, and all the orders which I have mentioned were directed to them. But the true ground is, ‘that they are voluntary societies submitting to government, and the ancient and usual way of redress is by appeal to the judges.’ The decision therefore of that case was grounded on the proposition that there was another mode of redress of which the party had not availed himself, namely, by appeal to the twelve judges. Had there been no such mode of redress, it may be fairly inferred, that in that case the court would have interfered by mandamus to perfect the right to which the party was entitled. Here, however, the party applying has resorted to the mode pointed out by the court in that case; he has appealed to the twelve judges,

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and as the judges have determined that they have no jurisdiction in the matter, he comes before this Court to claim that remedy which the law points out in cases where no other mode of redressing a wrong, or enforcing a right, is pointed out. This Court, therefore, has jurisdiction to grant a mandamus in the present case, to enforce the right now claimed. Lord *Mansfield* defines these inns of court to be "voluntary societies which for ages have submitted to government analogous to other seminaries of learning." What "government" does this mean? The judges in the present instance disclaim any jurisdiction as a domestic forum. It follows then, that the government to which the societies submit themselves, must be the control of the court of King's Bench, and the authority of his majesty's writ of mandamus. If this proposition be denied, the result is, that they are no longer voluntary societies submitting to government, but societies exercising powers, not merely of legislation, but of decision, and that without appeal, respecting the rights of the king's subjects,—powers which no where exist, and are no where assumed, by any other body in the realm. The society of Lincoln's Inn may have good reasons for refusing to admit a particular individual as a member of their body, but it is contrary to every principle of justice that they should exercise the power of deciding against his claim without assigning reasons for their decision. It is not necessary on the present occasion to determine that the party applying has an absolute right to be admitted a member of the society. All that is desired is, that his claim may be the subject of inquiry, and not left to the arbitrary decision of the benchers without shewing some disqualification on his part. *Primâ facie*, every subject of the king, willing to conform to the rules and regulations of the society, has a right to be admitted a member thereof, with a view to qualify himself for the bar. The onus lies on the other side, to shew that there is any disqualifying circumstance either in the character or capacity of the party claiming the right. None

is here suggested ; and as there is no other remedy left to enforce his claim but mandamus, that is the proper legal course to be adopted. The case of *Rex v. The Chancellor, &c. of Cambridge* (a), establishes the principle on which this application is founded. That was a mandamus to restore *Richard Bentley* to his academical degree of bachelor of arts, and bachelor and doctor of divinity ; and there being no visitor, the court held mandamus to be the proper remedy. In giving judgment in that case, the Lord Chief Justice said, “ It is the glory and happiness of our excellent constitution, that to prevent any injustice, no man is to be concluded by the first judgment ; but that if he apprehends himself to be aggrieved, he has another court to which he can resort for relief ; for this purpose the law furnishes him with appeals, with writs of error, and false judgment ; and lest in this particular case the party should be remediless, it was become absolutely necessary for this court to require the University to lay the state of their proceedings before us ; that if they have erred, the party may have right done him, or if they have acted according to the rules of law, that their acts may be confirmed.” Here there is no other remedy ; and it is absolutely necessary for the Court to require the benchers to lay the state of their proceedings before this Court, in order that right may be done. In the case cited there was no visitor. The visitors here are the judges ; but as they have no jurisdiction in this matter, it follows that in order to do justice, a mandamus must go. But the case of *Rex and Regina v. St. John’s College, Cambridge* (b), establishes that even where there is a visitor appointed by the founder of a college, the jurisdiction of this Court is not ousted ; and there the court said, “ the visitor is made by the founder, and is the proper judge of the private laws of the college ; he is to determine offences against those laws ; but where the law of the land is disobeyed, this Court will take notice thereof,

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(a) 1 Stra. 557. Id. Raym. 1334, S. C.

(b) 4 Mod. 241.

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notwithstanding the visitor, and in this case the proper way to put it in execution is by this writ of mandamus." These are authorities which in principle support the present application. As a seminary of learning this society may prescribe rules and regulations for its government, but no satisfactory reason can be assigned for the principle of exclusion on which it has acted in this instance. The present application concerns a large portion of his majesty's subjects. The jurisdiction assumed by the society is anomalous, and the question is, whether a society not sanctioned by prescription or charter, can arbitrarily bar the avenues to a public profession which is open to every man not disqualified by moral or other incapacity, and this without the control or visitation of any known authority in the land. The present applicant has conformed to the preparatory steps stated to be requisite in a work called the *Student's Guide*, published under the sanction of the society. It is a fearful proposition, therefore, that all the king's subjects shall be concluded by the determination of a body constituted as this society is, without even having the satisfaction of knowing the reasons upon which they have acted. On a return to a mandamus, the society may be able to assign a sufficient reason for the rejection of this applicant; but at all events, he has a right to know upon what grounds he has been rejected. His rejection implies a stigma upon his character, which he has a right to have investigated. There is no condition to which he is not ready to submit; and being willing to conform to the regulations of the society in every respect, reason and justice require at least that the grounds of his rejection shall be specifically assigned. Without pretending to be versed in the origin of these inns of court, he stands upon the general law of the land, and upon this axiom, that as a free subject of this realm, ignorant of any legal disqualification, or individual incapacity, he has a right to claim the means of preparing himself as a candidate for an

honorable and liberal profession. Conceiving this principle to be irrefragable, he submits, that he is at least entitled, as a debt of justice, to require that those who prohibit his admission shall be called upon to shew cause why he is to be excluded.

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ABBOTT, C. J.—This matter has been before us in the memorial presented by Mr. *Wooller*, and the subject has undergone our careful consideration; and in the mode in which the application for a mandamus has now been made, I must do Mr. *Wooller* the justice to say, that he has acted with great propriety. I am, however, of opinion that the Court has no power to direct the required writ, and if the Court has no power to direct the benchers of *Lincoln's Inn* to admit this gentleman a member of their society, of course we cannot compel them to assign their reasons for refusing the admission. I know of no instance in which a mandamus has ever been applied for to admit a person a member of such a society. In the case to which Mr. *Wooller* has referred, of *Rex v. The Benchers of Gray's Inn* (a), Lord *Mansfield* speaks of these societies as being only “voluntary societies.” Now the very term “voluntary society,” imports that there is a discretion in the society itself in determining what persons shall or shall not be admitted members of the body. Lord *Mansfield* goes on further to say, that they are “voluntary societies which for ages have *submitted to government*, analogous to that of other seminaries of learning.” The expression “submitting to government,” must be understood to mean a submission to the rules and regulations of the society itself, for the government of its members, after they have been admitted into the association. The submission there alluded to, is to government, as exercised by the heads of the particular society, over actually admitted members, and not a submission to the government of any foreign jurisdiction respecting the right of admission. But even

(a) Doug. 339.

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where an actually admitted member has reason to complain of any act done, or omitted to be done, by the heads of the society, this Court does not interpose by mandamus. In that case the twelve judges act as visitors in the nature of a domestic forum, and may direct what is proper to be done in the matter which is the subject of complaint. So that if the gentleman now applying were actually a member of this particular society, and he had any ground of complaint, the proper remedy would not be by mandamus, but by appeal to the twelve judges as a domestic forum. It is argued that there is an inchoate right in all the king's subjects, not otherwise expressly disqualified, to become members of an inn of court. If that proposition had been established much would have been done towards the success of this application, but it does not appear that such a proposition is, or can be supported. There can be no inchoate right in any person to become a member of a voluntary association, whatever consequences may follow from his admission. If such a principle were adopted, it must be equally applicable to other societies. It might as well be said, that if a particular individual is desirous of practising medicine in the city of *London*, which he cannot do unless he obtains a degree of some university, he has such an inchoate right to become a member of the college of physicians, that this Court would grant a mandamus to the college to perfect that right. Again, with respect to the degree of doctor of civil law, without such a degree obtained in one of the universities of *England*, no person can be allowed to practice as an advocate in the court of Admiralty or superior ecclesiastical courts, and no instance has ever occurred of a mandamus to either of the universities, to admit a person as a member in order that he might proceed to take his doctor's degree, and thereby enable himself to exercise the profession of an advocate in those courts(a). The present applicant has failed to shew that

(a) Vide *Rex v. The Archbishop of Canterbury*, 8 East, 213, where the court held that mandamus would not lie to the Archbishop of Can-

he has any inchoate right which this Court has authority to perfect; and I think there is no inchoate right in any person to become a member of a voluntary association, which is a much stronger case than that of a person desirous of becoming a member of an university, or of exercising the medical profession. I have great confidence in the society in question, and the Court must presume that they generally act with propriety in the exercise of their discretion as to the admission of members of the inn; and as no instance has ever occurred of a similar application to the present, I think we are bound to refuse it on this occasion, inasmuch as we have no authority by law to do what the applicant requires.

BAYLEY, J.—If I thought this case admitted of any degree of doubt, I should have paused before I delivered my opinion; but, upon mature consideration, and having thought of the matter over and over again, particularly as it has been the subject of investigation elsewhere, I have not the least degree of doubt, that the Court is not competent, and has not the power, to grant the writ for which Mr. *Wooller* applies. I take it to be a general rule that the writ of mandamus lies in those cases only in which the party applying has a right to have the thing done which he requires; and where there is an obligation on the party to whom the writ is directed, to obey the mandate. In the case referred to from *Strange's* and Lord *Raymond's* Reports, the party had been deprived of a right which he had acquired, and therefore this Court interfered by mandamus to restore him to that of which he had been improperly deprived; but considering the nature of these inns of court, and the origin of their institution, I think we are not warranted in saying that they are under any obliga-

terbury to issue his fiat to the proper officer for the admission of Doctor *Higmore*, as an advocate of the Court of Arches, on the ground that the doctor had no inchoate right to be admitted a member of the college of Doctors of Law.

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tion to admit as many of his majesty's subjects as shall think fit to apply for admission as members. These are voluntary associations, and may ad libitum admit, or refuse to admit, whom they please, according to their discretion. There is a very great difference between the case of a person who has been admitted a member of one of these societies with a view to be called to the bar, and the case of a person who has never been admitted. In the former case, the party may have incurred expense—have dedicated a great part of his life in preparation, and may have been induced to believe, after he has gone through the regular course of study, that he shall be permitted to practise at the bar. In such a case, however, this Court does not grant a mandamus to the benchers to admit the party to the degree of a barrister. The remedy is by appeal to the twelve judges, who act as visitors to the different societies, and in the nature of a domestic forum do that which is fit and proper to be done under the circumstances. But a very different point arises where the question is, whether these societies shall or shall not admit a person as a member, in order that he may qualify himself ultimately to be called to the bar. I do not think there is any inchoate right in the king's subjects to be admitted members of these societies. These societies frame their own rules, as to the admission of members, and this Court has no control over those rules. They may, as far as I can judge, exercise an unlimited, and even a capricious authority upon the subject, and yet this Court would not have any power of saying that such powers shall not be exercised. If, after a person is admitted a member, whereby he acquires an inchoate right to be called to the bar, the benchers refuse to admit him, there is a remedy by appeal to the judges, as visitors, who may if they think proper perfect the privilege to which he has acquired an inchoate right. But the original admission is a matter entirely voluntary on the part of the benchers, who may or may not admit as they think proper. To a

certain extent, this case is analogous to an admission as a member of one of the Universities, and I know of no instance in which this Court has granted a mandamus to admit a person as a member of a college. We know that in point of practice colleges are in the habit from time to time of exercising a discretion in refusing to admit particular members, and I think they are warranted in such refusal. No man has an inchoate right to insist on being admitted a member of a voluntary society. Had it been shewn, that according to the original institution of these societies there was a duty imposed by public authority, upon the masters or heads, to admit every person who should from time to time present himself for that purpose, [provided there was no personal ground of objection], and the party refused admission had no other means of enforcing his right, then I apprehend this Court would grant a mandamus; but in the absence of any such proof, I am clearly of opinion that this Court has no authority to grant a mandamus.

HOLROYD, J.—I am also of opinion that this Court has no power by law to grant a writ of mandamus for the purpose stated. There is no obligation on the members of a voluntary society to admit a stranger into their association. When once a person is admitted as a member of such a society he must conform to the rules and regulations established for the government of the whole body, and that is what is meant by “submitting to government,” in the language of Lord *Mansfield*. The same principle applies to colleges in the Universities. The heads of colleges may lawfully exercise a discretion as to what persons shall be admitted members, and in case of refusal, I apprehend it to be perfectly clear, that no mandamus would lie at the instance of the party refused. The same principle applies to trading corporations. A person having an inchoate right to become a member of a corporation, might have his right perfected by mandamus; but I apprehend


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that a stranger desirous of setting up a trade in a corporate town, could not compel the corporation by mandamus to make him free and admit him to corporate privileges. So this individual, having no inchoate right to become a member of an inn of court, cannot have a mandamus, for in order to found an application of that nature, there must be a specific legal right, as well as the want of a specific legal remedy.

LITTLEDALE, J.—The inns of court are voluntary societies, and when it is said that they are submitting to government, that means a government to be exercised upon the members themselves. It is true that the twelve judges act as visitors, but that is merely for the purpose of composing differences between the members, or determining any matter of complaint arising among the members themselves. It is upon this principle that the judges entertain appeals in cases where individuals have been refused admission to the bar; but in all these cases the party appealing has been a member of the society, and has had an inchoate right to be called, which the judges may perfect by exercising the power of visitation as a domestic forum. This is the government to which the heads of the society submit; but there is no authority either in the judges or in this Court to compel them to admit a person as a member of their body. This is entirely discretionary with themselves, and they are not liable to the control or government of a foreign jurisdiction. Here the party applying has no inchoate right to be admitted, and this Court has no authority to administer a legal remedy unless there is a legal right. A corporation cannot be compelled to admit a person to his freedom, unless he has acquired an inchoate right to become a freeman. So of a college, mandamus will not lie to the heads of a college to admit a member unless he has an inchoate right to be entered. For the like reason, the benchers of a law society are not bound to admit a person a member in order that he may qualify himself to

be called to the bar. If he be once admitted, and has afterwards acquired an inchoate right to be called, then that right may be perfected by appeal to the judges, if they see just cause for interfering; but even in that case the decision of the judges is final, and this Court has no authority to grant a mandamus to have the party called at all events.

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Rule refused.

LORD HUNTINGTOWER v. HEELY.


ON shewing cause against a rule for taxing the defendant his costs, under the 43 Geo. 3, c. 46, s. 3, the plaintiff having recovered a sum for which the defendant could not be arrested; the question was, whether the case came within the words of that section, it appearing that the defendant had been arrested for a sum of money, for the greater portion of which the plaintiff's agent knew at the time of the arrest that the defendant had obtained his discharge under the insolvent debtor's act, and

The COURT held, that an arrest under such circumstances was oppressive and without any probable cause, and therefore made the

Rule absolute.

E. Lawes, for the plaintiff; *C. F. Williams*, for the defendant.

Monday,
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 Where a defendant was arrested for a sum of money in respect of the greater portion of which the plaintiff knew at the time, that the defendant had obtained a discharge under the insolvent debtor's act:—
 Held, that the defendant was entitled to have his costs taxed under 43 Geo. III., c. 46, s. 3, as upon an arrest without probable cause.

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Mandamus lies to the justices and the clerk of the peace of a borough, to permit the attorney on behalf of certain persons, contributors to the county rate, "to inspect and take copies of the last two rates made for the borough, and all orders made for the expenditure of the same, and the several orders of sessions made thereon, and all other proceedings and documents relating thereto." (See note post).

The KING v. The JUSTICES of LEICESTER.

THIS was a rule calling upon the defendants to shew cause why a writ of mandamus should not issue, directed to them and to the clerk of the peace for the borough of *Leicester*, commanding them to permit the parishioners of the parish of *Saint Martin* in the said borough, or any of them, to inspect and take copies of all orders of sessions, rates, and other proceedings of the general quarter sessions of the said borough, relative to rates imposed upon the said parishioners by the justices of the said borough, or to which they were contributory, and all accounts and documents relating thereto. The affidavits upon which the rule was obtained set forth, in substance, the following facts: that the rates had of late become extremely burdensome to the inhabitants of the borough; that an abstract of the treasurer's receipts and disbursements had of late been published annually, but did not afford full and sufficient information to those who contributed to the rates; that the deponents *doubted not, and believed* that it would upon due investigation appear, that the justices had levied upon the inhabitants of the borough larger sums than were necessary, or warranted by law; that the inhabitants, being desirous of obtaining fuller and more sufficient information respecting the purposes to which the money raised by the rates had been applied, had, by one *Samuel Miles*, their attorney in that behalf, made application to the justices assembled in quarter sessions, to be permitted to inspect and take copies of all such orders of sessions, rates, and other proceedings, and all accounts and documents relating thereto, but that such application was refused; and that at the time of making such application the said *Samuel Miles* had stated to the justices so assembled in quarter sessions, that the said application was made solely for the purpose of obtaining a judicial decision

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upon the question, whether the inhabitants were or were not entitled to such inspection. The affidavits in answer to the rule stated, that an abstract of all the treasurer's receipts and disbursements had been duly published yearly and every year, in a public newspaper (therein described) pursuant to the statute 55 Geo. 3, c. 51, s. 18, and set out the abstracts so published for the last two preceding years. This rule was obtained in *Easter* term last.

Scarlett, Tindal, and Goulburn now shewed cause. The justices assembled in quarter sessions, had a discretionary power to grant or refuse this application. No grounds were laid before them to induce them to grant it, therefore they were justified in refusing it. No grounds are laid before this Court, either for the original application, or for this motion, for the affidavits do not allege any specific misapplication of the funds, but merely state that the deponents "doubt not and believe," that upon investigation it will appear that some such misapplication has been made. [*Abbott*, C.J. The affidavits are certainly somewhat loose, and the object of the rule rather indefinite]. Neither is this application warranted in point of law, for the right now claimed by these parishioners is not given them by any one of the statutes upon the subject. The 12 Geo. 2, c. 29, empowers the justices at quarter sessions to make the rates, and to direct the treasurer to pay over the money to such persons as they shall select, and enacts, (in section 8), that the accounts of the treasurer, after they have been audited and passed, shall be deposited with the clerk of the peace, "to be from time to time inspected," *not by the parishioners*, but "by the said justices, or any of them." If the legislature had intended to vest the right of inspection in the parishioners, they would have used clear and express words for that purpose, as in section 14 of the same act, which provides, "that all contracts made for repairing public bridges, and other public works, shall, with all orders relating thereto, be entered in a book to be kept by

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the clerk of the peace, or town clerk, among the records, to be inspected by any justice, *and by any person employed by any contributor to the purposes of this act.*" Again, the 17 Geo. 2, c. 3, s. 2, which gives to every rated inhabitant the right of inspecting poor's rates, uses express and unequivocal words for that purpose. Besides, the 55 Geo. 3, c. 51, provides a mode of informing the parishioners as to the application of the public funds, which would be perfectly unnecessary if they had before possessed the right of inspection now claimed; for it enacts, (in section 18), that once in every year an abstract of all the treasurer's receipts and disbursements, signed by the justices who have audited the same, shall be published in a public local newspaper; and the affidavits in answer to this rule, shew that this enactment has been constantly complied with in this borough. Grievous inconveniences, and endless litigation, would be the necessary consequences of transferring the right of inspection from the justices at sessions to the contributors at large; and no good can possibly result from it: because if the parishioners conceive themselves aggrieved by the rate, the 12 Geo. 2, c. 29, s. 12, gives them an appeal through their churchwardens and overseers, which is at once a proper and efficient remedy for any such grievance.

Copley, A. G., contra. The money levied upon the inhabitants is to be applied to certain specific purposes, and every rated inhabitant has a right to know whether it has been so applied or not. The abstracts published in the newspaper, and set forth upon the affidavits, are far too loose and unsatisfactory to afford them such information, therefore they are entitled to inspect and take copies of the rates themselves, and of all orders for the payment of money out of them. Such orders, if illegal, are removable into this Court by certiorari; but how can the inhabitants ascertain whether they are legal or not, unless they have the power of inspecting both them and the rates with reference to which they are made? The right of appeal

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given by s. 12 of the 12 Geo. 2, c. 29, is no answer to this application, for it has no bearing whatever upon orders of sessions made for the payment of money out of the rates; it applies exclusively to the rates themselves, and to cases in which parishioners consider themselves aggrieved by the mode in which the rates are assessed. (Here the Court stopped him).

ABBOTT, C. J.—The terms of the present rule are, as I have before observed, far too loose and indefinite, but we have authority to mould them so as to meet what appears to us to be the justice of the case. Let a mandamus issue, directed to the justices at sessions and to the clerk of the peace, to permit *Samuel Miles*, as the attorney on behalf of the parishioners, to inspect and take copies of the last two rates made for the borough, and of all orders made for the expenditure of the same, and of the several orders of sessions made thereon, and of all other proceedings and documents relating thereto. A mandamus in those terms will satisfy the justice of the case, and therefore let the rule for a mandamus in those terms be made absolute.

The other judges concurred.

Rule absolute accordingly (a).

(a) A former rule had been obtained in this case, in terms similar to those of the above, and upon affidavits disclosing similar facts, except that the application for permission to inspect the rates, &c., was stated to have been made “by the authorized agent of the parishioners, to the said justices and clerk of the peace,” not stating that it was made to the said justices in quarter sessions assembled.

Upon shewing cause against that rule, a preliminary objection was taken, that no application had been made to the justices assembled in quarter sessions for permission to inspect the rates, &c.; and it was contended, that until such application had been made and refused, the motion for a mandamus could not be entertained.

THE COURT, after argument, said it was quite clear that a mandamus could not issue without a previous application to, and refusal by the court of quarter sessions, and upon that ground discharged the rule.

after application for such inspection made to and refused by the justices assembled in quarter sessions.

Mandamus to the justices and the clerk of the peace of a borough, to permit the attorney on behalf of certain persons, contributors to the county rate, “to inspect and take copies of the last two rates made for the borough, and all orders made for the expenditure of the same, and the several orders of sessions made thereon, and all other proceedings and documents relating thereto,” does not lie till

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If bail do not justify within four days after exception, plaintiff may proceed upon the bail-bond, even though the bail were put in earlier than was necessary; but he cannot attach the sheriff until the rule for bringing in the body has expired.

BOND v. EVANS (a).

COMYN had obtained a rule nisi for setting aside the proceedings against the bail in this case, upon an affidavit shewing the following state of facts:—The defendant was arrested upon a *capias* returnable on the morrow of *Saint Martin*, being the 12th of *November*. Bail was put in on the 16th, an exception entered on the 17th, and notice of justification given for the 21st; but the bail did not justify on that day. On the 22d the plaintiff took an assignment of the bail-bond, and sued out writs against the bail. The question was, whether the proceedings against the bail were not premature.

Campbell shewed cause against the rule, and contended that the proceedings were perfectly regular. He relied upon *Dent v. Weston* (b), where it was held, that if the fourth day for perfecting bail be the last day of term, and the bail be not perfected before the rising of the Court on that day, an assignment of the bail-bond to the plaintiff, in the evening of that day, is regular.

Comyn was heard in support of the rule, and the Court took time to inquire into the practice and to consider of the point.

BAYLEY, J., now gave judgment.—The Master has certified the practice to be, that the defendant is bound to justify his bail within four days after exception, even though the bail may have been put in earlier than was necessary; and that if he does not, the plaintiff may take an

(a) The puisne judges of the Court sat, as upon former occasions, from *Tuesday*, 29th *November*, to *Saturday*, 10th *December*, and from *Monday*, 9th *January*, to *Friday*, 20th *January*, both inclusive, during which intervals this and the following cases were decided.

(b) 8 T. R. 4. Vide *Tidd*, 289, et seq. 6th ed.

assignment of the bail-bond and proceed against the bail immediately, although he cannot attach the sheriff until the rule for bringing in the body has expired. That being so, the plaintiff has not been guilty of any irregularity in this case, and consequently the rule must be discharged.

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Rule discharged.

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THIS was a rule calling upon the plaintiff to shew cause why the Master should not review his taxation, and disallow the plaintiff all his costs previous to the giving of the cognovit in the cause by the defendant; and why the execution levied upon the judgment should not be reduced accordingly. The rule was granted upon an affidavit stating, that after the cause had been brought to issue and put down for trial at the assizes, the plaintiff accepted from the defendant a cognovit for the sum of 225*l.*, payable at a future day, *in full discharge of the action.*

Where plaintiff, on the eve of trial, accepted from defendant a cognovit for a certain sum, payable at a future day, in full discharge of the action, and the Master on taxation allowed plaintiff costs previous to the cognovit; the Court refused to admit plaintiff's affidavit stating a verbal agreement that he should have such costs in case defendant made default in payment, and that he had made such default, and made the rule for the disallowance of such costs absolute.

Carter now shewed cause against the rule, and produced an affidavit which stated, that the arrangement for the settlement of the cause was made on the evening before the trial was to take place; that the parties did not finally agree upon that arrangement till past midnight; that the cognovit was at that late hour prepared by the clerk of the plaintiff's attorney in great haste and without due caution; that it was at the time expressly agreed between the parties, although by accident it did not appear upon the face of the cognovit, that in case the defendant made default in payment on the day stipulated for in the cognovit, the plaintiff should be allowed his costs of the action; and that the defendant had in fact made such default. Under these circumstances, he contended that the

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Master was right in allowing the costs, and that there was no ground for this application.

PER CURIAM.—If we were to act upon the statement made in this affidavit, we should be in effect admitting parol evidence to alter the nature and to contradict the terms of a written instrument; which it would be highly dangerous and against all the rules of evidence to do. If the cognovit had been obscure and equivocal in its language; if, in other words, there had been a latent ambiguity about it, we might have received parol evidence to explain that ambiguity, and to render the intention of the parties intelligible. But there is no ambiguity at all about this cognovit; the terms of it are clear and explicit: and if the plaintiff through his own carelessness has omitted to express in it that which was intended to be there expressed, and has declared only half his meaning where he professed to declare the whole, he must abide the consequences of his own negligence, and cannot expect any assistance from us. The rule, therefore, for referring the case back to the Master to ascertain and disallow the costs previous to the cognovit, and for reducing the execution accordingly, must be made absolute; but, upon condition that the defendant undertakes not to bring any action for the excessive execution.

Rule absolute.

TILSON, gent., one, &c., v. The WARWICK GAS-LIGHT COMPANY.

A private act, incorporating a Gas-light Company, enacted

that the costs of obtaining the act should be paid out of the money subscribed, in preference to all other payments. The attorney who obtained the act sued the Company in debt, upon the act, for his costs:—Held, first, that the action was maintainable, without setting out any deed; and, second, that if not, still the objection could only be raised by *special demurrer*.

DECLARATION in debt. The first count stated that plaintiff was retained and employed by certain persons, projectors of an undertaking for lighting the town of

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Warwick with gas, to solicit and obtain an act of parliament for the completing and carrying on the undertaking; that plaintiff did solicit and obtain an act of parliament, intituled "an act for incorporating the *Warwick Gas-light Company*;" that the necessary and proper costs, charges, and expenses of plaintiff attending the soliciting, obtaining, and passing the act amounted to 600*l.*; that in and by the act it was enacted, that the costs, charges, and expenses attending the soliciting, obtaining, and passing the act should be paid and discharged out of the money to be subscribed by virtue of the act, in preference to all other payments whatsoever; that large sums of money, amounting to 10,000*l.*, were subscribed by virtue of the act, and came into the hands of the company, whereupon it became the duty of the company to pay, and they became liable to pay, and ought to have paid plaintiff the costs, charges, and expenses of plaintiff attending the soliciting, obtaining, and passing the act, from and out of the money subscribed by virtue of the act, in preference to all other payments whatsoever; that, being so liable, the company agreed to pay the same to plaintiff when thereto requested; whereby, and by reason of the premises, and by virtue of the act, and of the 600*l.* being and remaining wholly unpaid and unsatisfied, an action accrued, &c. Counts for work and labour, and the money counts. General demurrer to the declaration, and joinder in demurrer.

W. O. Russell, in support of the demurrer. All the counts are bad. This is an action against a corporation. The common counts are all upon simple contract. Generally speaking, a corporation cannot make a simple contract. They can do no act but by deed. There are some excepted cases. "Assumpsit will lie upon a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognised by statute." *Murray v. The East India Company* (a); and the same principle seems to have been

(a) 5 B. & A. 204.

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admitted in other cases, *Edie v. The East India Company* (a); *Slark v. The Highgate Archway Company* (b). The present case is not within that exception, for the act of parliament does not authorise this company to draw and accept bills, and they are clearly not a trading company, *Broughton v. The Manchester Water-works Company* (c). Again, a corporation may appoint servants for ordinary purposes, as a butler, or a cook, without deed, *Vin. Abr. Corporation*, K.; but there is no instance of their liability for wages being enforced even under such circumstances. A corporation cannot demise, nor even grant a license, but by deed, *Rex v. Chipping Norton* (d), *Bro. Abr. License*, Pl. 16. [*Bayley, J.* You are assuming that this is a debt upon simple contract, but how does that appear? This is an action of *debt*; the plaintiff avers that the defendants are *indebted* to him; they have demurred *generally*: and if they are incapable of contracting but by deed, must we not presume, upon a *general* demurrer, that they did contract by deed?] The plaintiff has not declared upon a deed, therefore it must be presumed that there is none, *Atty v. Parish* (e); where it was decided, that the debt arising out of a contract for freight and demurrage entered into by deed, the plaintiff could not declare in debt *generally* for the carriage of goods, and the use and hire of ships, and give the deed in evidence to ascertain the amount, but must declare upon the deed. That case is expressly in point, and must govern the present. [*Bayley, J.* I never thought that the decision in that case was agreeable to law, nor do I think so now; and even there it is admitted that in an action of debt for rent in arrear under a lease, it is not necessary to declare upon the lease: indeed, both for freight under a charter party, and for rent under a lease, nothing is more common than to declare *generally* in debt, and to give the deed in evidence; and an action of *indebitatus assumpsit* for work and labour

(a) 2 Burr. 1216.

(b) 5 Taunt. 792.

(c) 3 B. & A. 1.

(d) 5 East, 239.

(e) 1 New Rep. 104.

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generally, where there has been a special contract between the parties, is also very common. [*Holroyd, J.* The act of parliament raises a duty on the part of the defendants, and constitutes this money a debt from them to the plaintiff; then why may not the plaintiff sue for it in an action of debt, without setting out any deed? *Bayley, J.* A duty, and an agreement to perform that duty, are implied on the part of the defendants by the act of parliament; therefore there is no occasion for any contract by deed. The act enjoins them to pay these costs out of the money subscribed, in preference to all other payments; then it is their duty to pay it; they become indebted—non-payment is a breach of their duty, and a withholding of the debt; then debt will lie without any reference to any deed or contract at all]. Even in that view of the case, debt cannot be the proper form of action. If the allegation, that the defendants contracted, can be rejected, and the action be regarded as arising out of a duty created by the statute, then the proper form of action would be case; because then the cause of action is the negligence of the defendants, in not obeying the requisites of the statute, to the damage of the plaintiff.

Walsh contra. The allegation, that the defendants agreed to pay, is immaterial and unnecessary, and may be rejected as surplusage. The cause of action is not the breach of a contract to pay money, but the non-performance of a duty prescribed by the statute. The first count, therefore, is clearly good. The facts stated on the record are conclusive, to shew a legal obligation upon the defendants to pay the money. By neglecting to act under that obligation, the defendants have defeated the act of parliament and rendered it a nullity; therefore they have ceased to be a corporation at all, and cannot set up the objection as to the form of action. But even if that objection were good at all, it will not avail the defendants upon general demurrer; for the omitting to set out a deed is mere mat-

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ter of form, and cannot be so taken advantage of. *Utile per inutile non vitiatur*; and upon general demurrer, the contract must be presumed to have been by deed. The plaintiff, therefore, in either view of the case, is entitled to judgment.

Russell, in reply. No answer has been given to the objection, that the form of action should have been case. It is true that where a statute prohibits the doing an act under a certain penalty, but does not prescribe any mode for recovering the penalty, the party entitled may recover the penalty by an action of debt (*a*). Thus, under the statute 2 and 3 *Ed.* 6, c 13, debt lies for treble the value of tithes not duly set out. There are other statutes which expressly give an action of debt, as the 1 *Rich.* 2, c. 12, for an escape out of execution; the 4 *Geo.* 2, c. 28, s. 1, against a tenant for double the value of rent for holding over after notice to quit; the 32 *Geo.* 2, c. 28, s. 12, against sheriffs for extortion, and others. But where a statute merely prescribes a duty, without imposing a penalty, the remedy for the neglect of that duty is case, and not debt. Thus, in an action under the 8 *Anne*, c. 14, s. 1, by a landlord against a sheriff, for removing goods taken in execution, without paying him a year's rent, though the sheriff is bound to levy first for the rent, and afterwards for the execution, and to set apart money equal to the rent before he removes the goods; still the form of declaring is case for the breach of duty, and not debt for the money. [*Holroyd*, J. That is, because the sheriff in such cases is a tort-feasor. The statute prohibits him from removing the goods without paying the rent, and if he does so, he commits a tort, for which the landlord may recover damages. This is a very different case; here a debt is constituted, and wherever there is a legal obligation to pay, there debt lies. Even under the 28 *Eliz.*, c. 4, the sheriff may maintain debt for his fees. *Com. Dig. Debt*, (A.) 1].

(a) Vide 1 *Roll. Abr.* 593, pl. 18, 19.

BAYLEY, J.—It is not necessary in this case to decide whether a corporation can be sued upon a simple contract, because with respect to the first count of the declaration the demurrer does not raise that question. That count shews a legal obligation imposed by the statute upon the defendants to pay this money to the plaintiff, and therefore, upon the general principle of law, the plaintiff may maintain an action of debt for the money. It has been strongly urged, that the form of the action should have been case and not debt, as on the 8 *Anne*, c. 14, case is the proper form of action against the sheriff for removing goods without levying a year's rent. The distinction between the cases is this: The 8 *Anne* does not direct the sheriff to pay the rent to the landlord, but makes it his duty to levy the rent before he removes the goods; and if he removes the goods without levying the rent, he is guilty of a breach of duty, and liable for the damage arising therefrom. But this act of parliament does direct the company to pay the costs of obtaining the act out of the first money subscribed, and those costs are due to the plaintiff; therefore he may maintain an action of debt for them. I am clearly of opinion, therefore, that the first count is good. I am at present disposed to think that the common counts are good also. I cannot subscribe to the law laid down in *Atty v. Parish*. I do not admit that where the contract is such that the plaintiff may recover upon it, whether it is by deed, or not, the deed, if there is one, must be declared upon; on the contrary, the strong inclination of my opinion, upon principle, is, that though there is a deed, still, if there is a debt independent of the deed, except that the amount of it is to be ascertained by the deed, the existence of the deed does not prevent the plaintiff from recovering the debt upon the common counts. But even if a deed were necessary in this case, I think that upon general demurrer we are warranted in presuming that there is such a deed, and that the omission to set it out is mere matter of form. I am therefore of opinion,

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that this action, generally, is maintainable, and consequently, that there must be judgment for the plaintiff.

HOLROYD, J.—I am of the same opinion. I think all these counts are supportable. The first is clearly so, for it sets out all the facts necessary to constitute a debt. The allegation, that the defendants agreed to pay the money, may be rejected as surplusage, because, independently of that, the count states enough to shew a legal obligation upon the defendants to pay the money to the plaintiff; and wherever there is a legal obligation to pay, debt lies for the money so payable. Then, as to the common counts, I think the action maintainable also, because we may presume the existence of a deed upon general demurrer, even if the defendants are not liable to be sued without a deed; and the not setting it out is mere matter of form.

Judgment for the plaintiff.

Ex-parte SMITH.

The 3 Geo. 4, c. 102, giving increased jurisdiction to the Court, is to be construed liberally for the dispatch of business: and an affidavit sworn during term, is sufficient to bring the subject matter before the Court, as "a matter depending in the Court," within the terms of the act and the king's warrant founded thereon.

ANDREWS applied to the Court for a rule to re-admit an attorney under ordinary circumstances. The affidavit upon which he moved, had been sworn and delivered to him during the term, but it having been mislaid in his chambers, he had been prevented from making the application till after the term had expired.

PER CURIAM.—We at first doubted whether this motion could now be entertained as a matter depending in the Court during the term; but upon looking to the language of the act of parliament (a), and the king's warrant, under the authority of which we are now sitting, we think it may. An affidavit sworn in the Court, or before one of

(a) 3 Geo. 4, c. 102.

its officers, during the term, though not then made use of, seems to us sufficient to bring the subject-matter before the Court, so as to render it "a matter depending in the Court," within the act of parliament. The act, and the jurisdiction arising out of it, are to be construed liberally for the dispatch of business and for the benefit of the public; upon the whole, therefore, we think that this is a matter over which we have jurisdiction, constituted as the Court is at present.

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Rule granted (a).

(a) See *Lyttleton v. Cross*, ante vol. v. 187.

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ABRAHAM had obtained a rule calling upon the plaintiff to shew cause why it should not be referred to the Master to examine the declaration in this case, and to strike out superfluous counts. The action was brought for work done by the plaintiff as a short-hand writer for the defendant as an attorney, and the declaration contained four counts, two for work and labour as a short-hand writer specially, and two for work and labour generally.

Where a declaration contains special counts for work and labour, besides the general counts, the Court will strike out the former on motion, if they are plainly unnecessary, without referring the case to the Master, though the rule is in that form; for the form of the rule is immaterial: and if the plaintiff in such a case contests the rule, the Court will make him pay the costs, though the defendant is an attorney.

J. Evans shewed cause. This motion is erroneous in form, and vexatious in substance. In point of form, the proper course in such cases, is for the defendant to apply to the Court to examine the record and to strike out superfluous matter, and to leave it to them, if they have any doubt upon the subject, to refer the case to the Master; and not in the first instance to obtain a rule for referring the case to the Master, *Bagley v. Watkins* (a). In point of substance, the difference of expense to be effected can amount only to a few shillings, and the defendant ought to have applied first to the plaintiff to know if he would abandon the superfluous counts, before he put him to the

(a) 1 Chit. Rep. 450.

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expense of misrule, which will amount to several pounds: and the present course being adopted by an attorney, can only be for the purpose of increasing the costs, and is highly vexatious. It is difficult to say that any of these counts are superfluous, therefore the Court will act here as in the case of *Brindley v. Denham* (a), where a similar application was refused by the court of Common Pleas, who said that they considered it quite as vexatious as the grievance of which it complained. At all events, if the Court consider that there is any superfluous matter in this declaration, they will strike it out themselves, without putting the parties to the further expense of a reference to the Master, and then they will think it just to discharge this rule, and to make the plaintiff bear the costs of it.

Abraham, in support of the rule, was stopped by the Court.

BAYLEY, J.—The plaintiff's charge of vexation is not well founded. He has himself contributed to the expense of which he complains, by appearing to shew cause against this rule, instead of complying with the object of it, and striking out the objectionable counts. *Bagley v. Watkins* (b), is a different case from this, for there the particulars of demand simply stated the action to have been brought upon a bill of exchange, and it was impossible to say that the money counts were unnecessary there, or introduced for the purpose of oppression. Here the special counts are clearly unnecessary, for the counts for work and labour generally would have been amply sufficient for all purposes. There would have been more comity about the defendant's conduct if he had made his first application to the plaintiff, instead of to the Court, but I cannot say that he was bound to do so. As to the form of the rule, it seems to me quite immaterial, if there is ground for the application at all, for the cause to be shewn would be pre-

(a) 2 Bing. 184.

(b) 1 Chit. Rep. 450.

cisely the same, whether the rule were in one form or the other. I take the rule of practice to be, that where the matter objected to is plainly superfluous, the Court themselves will strike it out, but that where the point is doubtful, they will refer it to the Master to decide upon it. Therefore, as the plaintiff now consents that we shall strike out such counts as we think superfluous, we shall strike out the two to which I have alluded, without referring the case to the Master; and the rule will be absolute in that form, but for the reasons I have already given, the plaintiff must pay the costs of this application.

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Rule absolute with costs (a).

(a) Vide Tidd, 6th ed., et seq., and the cases there collected. 1 Chit. Rep. 448, 449.

The KING v. the Justices of SOMERSETSHIRE.


PURSUANT to a peremptory mandamus from this Court, the justices at the *Somersetshire Epiphany* sessions heard the appeal of *James Tucker* (a) against the decision of the special petty sessions for the hundred of *Winterstoke*, in the county of *Somerset*, dismissing his application for relief under the 3 Geo. 4, c. 33, s. 2; and found that Mr. *Tucker* had sustained damage to the amount of 30*l.* by two ricks of corn, his property, having been on the 4th November, 1823, wilfully consumed by fire, in the parish of *Yatton*, within the hundred of *Winterstoke*, in the county of *Somerset*; and they therefore ordered and adjudged the said sum of 30*l.*, together with the costs incurred in that behalf, to be paid to Mr. *Tucker* by the inhabitants of the hundred of *Winterstoke*, subject to the opinion of this Court upon the following case.

The 3 Geo. 4, c. 33, gives a summary remedy against the hundred, to the extent of 30*l.*, for injury sustained by the unlawfully and maliciously burning any house, barn, or stack, &c., although the injury be not committed by a riotous and tumultuous assembly: and the evidence of the party grieved is admissible before the

quarter sessions on appeal, as well as before the justices at petty sessions.

(a) Vide *Rex v. Tucker*, ante vol. v. 434.


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Two ricks of barley belonging to the appellant, were on the night of the 3d of *November*, at *Yatton*, in the hundred of *Winterstoke*, maliciously set on fire. The appellant duly made complaint, according to the provisions of 3 *Geo.* 4, c. 33, before the magistrates, assembled in a petty session, duly held within the said hundred, to recover damages. His complaint was there dismissed, upon the ground that no riot or tumult was proved to have existed. Upon the trial of the appeal against that adjudication, the appellant tendered in evidence his own examination taken on oath at the petty session, agreeably to the 9 *Geo.* 1, c. 22, which was rejected. The Court admitted the evidence of the party aggrieved and of his witnesses, concerning an unlawful and malicious fire, and the amount of the damage sustained thereby, without any evidence of any riotous or tumultuous assembly, and found that the appellant had sustained damage by means of an unlawful and malicious fire, without any riotous or tumultuous assembly, and made the above order upon the hundred of *Winterstoke*. The questions for the opinion of the Court are, first, whether under section 1 of 3 *Geo.* 4, c. 33, it was necessary to prove that the damage had been done by a tumultuous assembly; and second, whether the evidence of the party grieved was properly received at the sessions. If the Court should be of opinion that such proof was not necessary, and that the evidence of the party grieved was properly received, the hundred was liable; but a decision of either of those questions the other way would relieve the hundred from liability.


C. F. Williams, with whom was *Jeremy*, in support of the order of sessions. The first question turns entirely upon the statutes 9 *Geo.* 1, c. 22, and 3 *Geo.* 4, c. 33. By the former, (sec. 7), it is perfectly clear that the appellant would have had a remedy for the injury he has sustained by an action against the hundred. But the latter statute, after reciting the expense and inconvenience

attending such actions, enacts, that where the damage sustained shall not exceed 30*l.*, the right of bringing such actions shall be taken away, and that the party grieved shall have a summary remedy in the mode thereafter specified. It will be contended on the other side that the latter statute applies only to cases where the injury is committed *by a riotous and tumultuous assembly*; but the old remedy is taken away in all cases of mischief done by riotous and disorderly persons, or done unlawfully and maliciously: the new remedy, therefore, must have been intended to be co-extensive with the old one, because else the party in a case like the present would have no remedy at all, which certainly was not the object of the legislature. Indeed the contrary is evident; for the new statute expressly refers to damages committed by riotous and tumultuous assemblies, *and* by unlawful and malicious offenders generally, and the preamble declares the object of the act to be, not merely to take away any pre-existing legal remedy, but to substitute another which should be equally beneficial to the party grieved, and less expensive to the hundred. Then, with respect to the second question, there is no ground for saying that the evidence of the party grieved was improperly admitted, for it was admitted *ex necessitate*. His written examination was tendered and rejected, and then his parol testimony became necessarily admissible, for without the one or the other the facts of the case could not be ascertained, and justice could not have been done. The appellant, therefore, having been examined, "from necessity, on default of other proof" (a), was a competent witness. [Here the Court stopped him].

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Barnard and Erle contra. The latter of these statutes is not to be construed with reference to the former, which was clearly *intended* to apply to injuries committed by a number of persons acting in concert. "The 9 Geo. 1,


(a) Vide Phil. Ev. 2d edit. 58, 70, and the cases there cited.

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c. 22, commonly called the *Waltham* Black Act," is said by *Blackstone*, J., to have been "occasioned by the devastations committed near *Waltham*, in *Hampshire*, by persons in disguise, or with their faces blacked, who seem to have resembled the *Roberdsmen*, or followers of *Robert Hood*, that in the reign of *Richard* the First committed great outrages on the borders of *England* and *Scotland*"(b). Every act of parliament which gives a remedy against the hundred, from the hue-and-cry act downwards, speaks of injuries committed with violence, and by a number of persons acting in concert. The principle upon which this species of remedy was originally given, was to compel the inhabitants of the hundred to preserve the public peace; and injuries committed in secret, and without violence, do not seem to come within that principle. If this be so, there is an obvious reason why the legislature intended to confine the remedy given by the 3 *Geo.* 4, c. 33, to injuries committed by riotous and tumultuous assemblies; and upon any other principle it seems impossible to account for the introduction of the words "riotous and tumultuous assembly of persons" at the close of the first section of that statute. But even if the general intention of the legislature is doubtful, it is plain that they have not provided any remedy to meet this particular case. The act imposes a burden upon the public, and gives the justices at petty sessions an important summary jurisdiction; it must, therefore, be construed strictly. By section 2, the party injured is directed within a limited time to give notice to certain persons, "of such riotous and tumultuous assembly having taken place, and the nature and amount of the injury sustained," as a preliminary step; but if no such assembly has taken place, the party cannot give any such notice, or take any such preliminary step; consequently he cannot put himself in a situation to call upon the hundred for relief. By section 4, the justices are empowered "to examine the party aggrieved,

(b) 4 Bl. Comm. 246.

and his witnesses, touching such riotous and tumultuous assembly, and the damage *thereby* sustained, and “if they find that he has suffered any injury *by the means aforesaid*, to make an order of money to be paid” to him. Their power of inquiry, therefore, is limited to cases of riot, and they can no more examine into and give relief for an injury committed secretly in the night, and without violence, than they can examine into a highway robbery, or a burglary. Secondly, it was against all the rules of evidence to admit the appellant as a witness to prove his own case. He was a party interested, and therefore an incompetent witness by the common law, and nothing but the authority of an act of parliament will render him competent. But there was no such authority, for though the 3 Geo. 4, c. 33, does render the testimony of the party grieved admissible at the petty session, it does not extend that operation to an appeal. Neither was he admissible as a witness *ex necessitate rei*, for the nature of the injury complained of did not necessarily leave the facts of the case exclusively within his own knowledge, and therefore he might, and if so was bound to have proved his case by the evidence of disinterested individuals, and not by his own.

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BAYLEY J.—It must be admitted that there is some inaccuracy in the 3 Geo. 4, c. 33, and an omission to provide in express terms for the case now under consideration; but, looking at the act as a whole, and keeping in view the evident object of the legislature in passing it, I am clearly of opinion that the party grieved in this case has a remedy against the hundred, and that his evidence was properly received at the sessions. This act does not profess to take away any pre-existing remedy; its avowed object is merely to substitute in certain cases a new mode of relief for the old one. The preamble recites seven acts of parliament. Of six of them it speaks as relating to offences committed *by riotous and tumultuous assemblies*; but when it speaks

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of the 9 Geo. 1, c. 22, as relating to the offence in question, it drops that expression and proceeds thus :—"And whereas great expenses are incurred in recovering a compensation for small damages, by proceeding under actions at law, in compliance with the directions of the said statutes, the costs greatly exceeding in many instances the amount of the damages. And whereas for the relief of the inhabitants of the several cities, &c., in which such mischief may be done by riotous and disorderly persons, *or may be done unlawfully and maliciously*, it will be attended with great public benefit, that the damages not exceeding a certain amount should be recovered by a shorter and more summary process than is directed by the said recited acts: be it therefore enacted," &c. The introduction there of the words "*or may be done unlawfully and maliciously*," as applied exclusively to the 9 Geo. 1, c. 22, is by no means unimportant; and the preamble shews clearly that the new act was intended to apply to cases within the 9 Geo. 1, c. 22, s. 7, the same as to those within the other recited acts. The same distinction with respect to the 9 Geo. 1, c. 22, pervades the enacting part of the statute. Section 1, enacts, that where the damage shall not exceed 30*l.*, no person shall maintain any action for or on account of the injury sustained by the demolishing, &c., wholly or in part, any church, &c., or any dwelling-house, &c., by any persons unlawfully, riotously, and tumultuously assembled; using the same terms with reference to every one of the recited acts, except the 9 Geo. 1, c. 22, as to which it says, "or for, or on account of the loss, injury, or damage sustained *by the unlawfully or maliciously* killing or maiming of any cattle, cutting down or destroying any trees, setting fire to any house, barn, or out-house, hovel, cock, mow, or stack of corn, straw, hay or wood:" and afterwards, in a separate sentence adds, "or, for, or on account of the loss, injury or damage sustained by the setting fire to or destroying any ricks or thrashing machines, *by the act or acts of any riotous or tumultuous*

assembly of persons." Now, the latter provision is wholly inapplicable to any thing either in the 9 Geo. 1, c. 22, or any of the other recited acts, and must consequently either be rejected altogether as surplusage, or be taken as introducing a new remedy in a case where there was no remedy before. The same section then provides that "where any house, &c., shall have been so destroyed, or any *such* killing of cattle, or setting fire to any house, &c., shall have been committed, and the damage shall not amount to 30*l.*, the amount of *such* damage shall be recovered only by the ways and means thereafter directed." The word "*such*" in that part of the section must have reference to the injuries previously mentioned in the same section, and the injury by setting fire to houses, &c. there mentioned, is one committed *unlawfully and maliciously*, and not one committed *by a riotous and tumultuous assembly*. Now, the ways and means of recovering the amount of the damage, should be adequate to all the cases of injury previously enumerated. Would they be so, if the act were to be construed so as not to apply to the present case? Clearly not. In order to obtain relief under section 2, where any house, &c., shall have been destroyed, or any *such* killing or maiming of cattle, or setting fire to any house, barn, &c., done or committed," the party grieved must give notice "of such riotous and tumultuous assembly having taken place;" and it has been rightly argued that, accurately speaking, the word "*such*" must confine the remedy to cases where the injury has been done by a riotous and tumultuous assembly. But what would be the consequence? The consequence of that literal construction of the act would be that no remedy would be provided for one species of injury, which the preamble of the act clearly proves the legislature intended should have a remedy provided for it. Are we to give an act of parliament a construction from which such a consequence must follow? I think not. I think we are not to construe the statute literally, but that we must consider

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the notice of the riotous and tumultuous assembly to be inserted as an example only, and that we must read the clause as requiring notice of *such offence*, so as to make the remedy provided co-extensive with the injuries described. If that be the proper construction of the second section, it will apply with equal propriety to the fourth, which empowers the justices at petty sessions "to hear and examine the party aggrieved, and his witnesses, touching or concerning such riotous and tumultuous assembly;" and that seems the more reasonable, because that section speaks of the party aggrieved *generally*, and not of the party aggrieved by the act of a riotous and tumultuous assembly, and must, therefore, be considered as extending to parties aggrieved by any of the offences before enumerated. For these reasons I am of opinion, that although there has clearly been an error in the framing of the act, either by introducing the 9 Geo. 1, c. 22, after the first section had been made, and not varying the second and fourth sections so as to meet that introduction, or by some other means upon which it were now in vain to speculate, still the proper construction of it is to treat the second and fourth sections as co-extensive with the cases to which the recited acts applied, and thus to hold that the present case is within the operation of the statute. The other point seems to me too plain for argument, for I can have no doubt that the same evidence was admissible before the sessions on appeal, which the statute makes admissible before the justices at petty sessions. The order of sessions, therefore, must be affirmed.

HOLROYD, J., concurred.

Order of sessions affirmed (a).

(a) LITTLEDALE, J., was absent on the winter circuit.

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THIS was a rule calling upon the defendants, churchwardens of the parish of *Billinghurst*, in the county of *Sussex*, to shew cause why a writ of mandamus should not issue directed to them, and commanding them to permit *J. Puttock*, an inhabitant of the parish, assessed to the relief of the poor, from time to time, and at all reasonable times, to inspect the accounts of the churchwardens and overseers of the poor of the parish for the years ending at *Lady-day*, 1821, 1822, 1823, and 1824, respectively, upon making the payments, &c., required by the statute 17 Geo. 2, c. 38; and it was obtained upon an affidavit of *J. Puttock*, stating, that he had repeatedly applied for leave to inspect the accounts, and had tendered the necessary payments, but had constantly been refused: but he did not state that he had any or what reason for wishing to inspect the accounts.

The Court will not grant a mandamus to churchwardens to allow an inspection of their accounts, under 17 Geo. 2, c. 38, s. 1, unless the applicant states some public ground for desiring such inspection.

S. 14 of the act, which imposes a penalty upon churchwardens wrongfully refusing an inspection, is no answer to the application.

Brodrick shewed cause. In order to support this rule, the applicant must establish two propositions: first, that he has a specific legal right; and, second, that he has no specific legal remedy. The right depends upon the 17 Geo. 2, c. 38, s. 1, and this party is not within the operation of that clause. He does not demand an inspection of the accounts for the year ending at *Lady-day*, 1825, and he has no right to demand an inspection of the accounts of prior years; for the act directs that the accounts shall “yearly, and every year, be entered in books,” and that “*the said books* shall be carefully preserved,” and that the parish officers shall “permit any person assessed to inspect *the same* :” clearly limiting the right of inspection to the accounts of the year last past. Again, the only object of allowing the inspection is to give the party an opportunity to appeal; and in this case the time for appealing had expired with respect to all the accounts, except those for

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the year ending at *Lady-day*, 1825. Secondly, this party had a remedy under s. 14, of the act, which imposes a penalty upon any churchwarden or overseer who shall neglect or refuse to obey and perform the several orders and directions of the act, or any of them. This party therefore fails in establishing either of the propositions necessary to entitle him to ask for a mandamus, and therefore the Court have no jurisdiction to grant it. *Rex v. Clapham*(a), and *Rex v. Bletshow*(b), will be cited on the other side, but they are distinguishable from the present case, for in both those cases the application was by parish officers against their predecessors; but even if the Court should think that upon the authority of those cases they have jurisdiction here, still as the party has not thought proper to state any ground or reason for the inspection, the Court will not interfere to enable him to obtain it.

Long, contra. The preamble of the 17 Geo. 2, c. 38, shews that its application was intended to be general. It states that by reason of defects in the 43 Eliz. c. 2, the money raised for the relief of the poor was liable to be misapplied, and for remedy thereof, enacts that churchwardens and overseers shall deliver to their successors their books of accounts, and that every person assessed, or liable to be assessed, shall be permitted to inspect them, at all seasonable times. There are no words which limit the right of inspection to the last, or to any particular year, or which shew that the object of the inspection was confined to the purpose of appealing. This is a remedial act, and must be construed liberally. *Rex v. Clapham* is a decisive authority in favour of this application. There the Court granted a mandamus to compel the former overseer to deliver the books of poor rates to his successor, and said, "they are public books, and ought to be delivered over by one overseer to another, that all the parishioners may have access to them, and the overseer and church-

(a) 1 Wilson, 305.

(b) 1 Bott. 300.

warden for the time being ought to have the custody thereof." *Rex v. Bletshow* is a similar case. The 14th section is no answer to this rule, because the penalty there imposed is given, not to the party aggrieved, but to the churchwarden or overseer for the use of the poor; that, therefore, is no remedy, and does not at all affect the question. It is no objection that the party has not stated for what purpose he desires the inspection, for the statute does not confine the inspection to any specific purpose, but gives every parishioner a general right to examine the accounts for his own satisfaction.

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BAYLEY, J.—I am clearly of opinion that the statute 17 Geo. 2, c. 38, does not give parishioners a general right of inspecting the accounts, but that it gives a limited right of inspection for the remedy of the evils mentioned in the preamble, and for that only. It seems to me, therefore, that the person making such an application as the present, is bound to shew the purpose for which he desires the inspection, and that his purpose is one connected with the general interests of the parish, and not arising out of his own personal convenience or caprice. Here no purpose whatever is stated, and upon that ground I think this rule must be discharged. With respect to the 14th section, I think it right to add, that it furnishes no answer to this application; the penalty is not given as a compensation to the party aggrieved, but is imposed as a punishment upon the parish officer offending: and if it can be called a remedy at all, it is cumulative, and does not interfere with the real remedy provided, namely, the inspection of the accounts.

HOLBOYD, J.—I am also of opinion that this party has not brought before the Court any sufficient ground for their granting him the writ for which he asks. Lord Chief Baron Comyns says(*a*), that the writ of mandamus

(*a*) Com. Dig. Mandamus (D).

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is granted to prevent failure of justice, and for the execution of the common law, or of a statute, or of the king's charter; but not as a private remedy to the party. This applicant has not brought himself within that rule, because he has not stated the purpose for which he desires to inspect the books. A mandamus cannot be granted to enforce a mere private right, and this person's right of inspection, as a parishioner, is a mere private right. Undoubtedly the penalty imposed by the 14th section is not such a specific legal remedy as would prevent our interfering, but the party must shew some ground for the application, and that ground must be of a public nature: and as he has not done that in this case, I think the rule must be discharged.

LITLEDALE, J.—The words of the first section are certainly general, but not so general as to entitle a parishioner to an inspection without having some public ground for desiring it. Personal convenience or curiosity is not a sufficient ground. Here no ground whatever is stated. It cannot be for the purpose of appeal, because the time for appeal has expired, and it is difficult to imagine any other reasonable purpose that the party could have. The 14th section is no answer to this application, but for the reasons already stated the application is clearly unfounded.

Rule discharged, but without costs.

BLOXAM and another, assignees of SAXBY, a bankrupt, v.
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The purchaser of goods cannot maintain *trover* for them, without

paying the price; for though he acquires the right of property by the purchase, he can only acquire the right of possession by the payment: and in order to maintain *trover*, he must have both the right of property, and the right of possession.

TROVER for a quantity of hops. At the trial, before Abbott, C. J., at the *London* adjourned sittings after *Trinity* term, 1824, the plaintiffs obtained a verdict, damages

3000*l.*, subject to the opinion of the Court upon the following case.

The plaintiffs were the assigness of *J. R. Sarby*, a bankrupt, under a commission of bankrupt duly issued against him on the 5th *January*, 1824. The act of bankruptcy was committed on the 1st *November*, 1823, the bankrupt having on that day surrendered himself to prison, where he lay more than two months. The defendants were hop factors and merchants in the borough of *Southwark*. Previous to the bankruptcy, the bankrupt had been a dealer in hops, and on the 7th, 16th, and 23rd *August*, he purchased from the defendants, the hops, among others, for which this action was brought. Bought notes were delivered in the following form:—"Mr. *John Robert Sarby*, of *Saunders, Parkes*, and Co., *T. M. Simmons*, eight pockets, at 155*s.*, 8th *August*, 1823." Part of the hops were weighed, and an account of the weights was delivered to *Sarby* by the defendants. The samples were given to the bankrupt, and bills of parcels were also delivered to him, in which he was made debtor for six different parcels of hops, the amount of which was 739*l.* The usual time for payment in the trade was the second *Saturday* subsequent to a purchase. Part of the hops belonged to the defendants, and part they sold as factors, but they sold all in their own names, it being the custom in the hop trade to do so. It was proved that the bankrupt had said more than once, that the hops were to remain in the defendant's hands till paid for, and that he said so when he was about buying one of the parcels of hops for which the action was brought. The bankrupt did not pay for the hops, and on the 6th *September*, 1823, the defendants wrote to the bankrupt, and desired him to "take notice, that unless he paid for the hops they had sold him, on or before *Tuesday* then next, the defendants would proceed to re-sell them, holding him accountable for any loss which might arise in consequence thereof." Before the bankruptcy the defendants did not sell any parcel of hops

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without the bankrupt's express assent. After the notice already stated the defendants sold some parcels of the hops, but in one instance the bankrupt refused to allow the defendants to sell a parcel of hops to a person named by them at the price offered, and that parcel was accordingly sold by the defendants, before the bankruptcy, to another person, by *Sarby's* authority. On another occasion, in the month of *September*, the bankrupt had employed a broker to sell another parcel of the hops, but the defendants refused to deliver them without being paid for them. After the act of bankruptcy the defendants sold hops of the bankrupt's to the amount of 380*l.* 19*s.* 5*d.* The defendants delivered account sales of the hops so sold by them after the bankruptcy. The hops were stated to be sold for *Sarby*, and he was charged warehouse rent from the 30th *August*, and also commission on the sales. Besides the hops purchased from the defendants, the bankrupt placed in their warehouse nineteen pockets of hops for sale by them, as factors, of which fifteen pockets were sold on and after the 13th *January*, 1824, of the value of 77*l.* 19*s.* 5*d.*, and of which four remained in their warehouse at the time of the trial, which four were of the value of 14*l.*, and there were also unsold of the hops purchased from the defendants, seven bags, 56 pockets, of the value of 251*l.* 13*s.* 6*d.* There was a demand by the plaintiffs of these hops, and a tender of the warehouse rent and charges, and a refusal on the part of the defendants to deliver them, before the action brought. The jury found that the defendants did not rescind the sale made by them to the bankrupt.

J. Evans, for the plaintiffs. The assignees are entitled to a verdict for the full amount of the hops. Their claim to the nineteen pockets will hardly be disputed. They were the property of the bankrupt, deposited by him in the hands of the defendants, as factors, for sale, and therefore it is impossible to say that his assignees are not enti-

tled to recover the full value of them. The other parcels stand in a somewhat different situation. They were sold by the defendants to the bankrupt on credit, and were to be paid for, according to the usage of the trade, on the second *Saturday* after the sale: the defendants, therefore, could have no lien upon them, except by a special agreement made between the parties for that purpose, for the property in them vested in the bankrupt from the moment of the sale. For this Lord Chief Baron *Comyns* is an authority. He says, "If a man agree for goods at such a price, the bargain shall be void if the money be not paid immediately. For in every bargain, payment ought to be made upon the delivery of the goods, except where a future day is agreed upon for the payment." And again, "If a sale be of goods for such a price, and a day of payment limited, the contract will be good, and the property altered by the sale, though the money be not paid(a)." He cites *Dyer* 30, a, and other authorities to the point, and the principle has been recognized and acted upon in modern cases. *Hanson v. Meyer*(b), *Rugg v. Minett*(c). It is true that the hops remained in the warehouse of the defendants, but that does not alter the case, because the bankrupt was charged the warehouse rent upon them, and, therefore, they were, by construction of law, as much in his possession, as if they had been actually removed into his own warehouse. *Hurry v. Mangles*(d), *Harman v. Anderson*(e). Confining the consideration of the case then to the written contract, the result is, that the plaintiffs at the time when the goods were sold by the defendants, had both the right of property and the right of possession, and consequently are entitled to maintain trover for their full value. But, it will be contended, that though the written contract, on the face of it, purports to shew that the goods were to be delivered immediately, the parol evidence went to shew that they were not to be delivered till they were paid for: and that evidence it will

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(a) Com. Dig. Agreement, (B).

(b) 6 East, 614.

(c) 11 East, 210.

(d) 1 Camp. 452.

(e) 2 Camp. 243.

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be argued, was admissible. That evidence, however, was clearly not admissible, because the effect of it was to vary the written contract. [*Bayley, J.* What is there on the face of the written contract, to shew that the goods were sold on credit?] Perhaps that does not appear upon the face of the written contract, but it was the general usage of the trade, and consequently it might be proved by parol evidence, though not expressed in the written contract, because that went only to explain, and not to vary, the written contract. *Charleton v. Cotesworth(a)*, *Ulede v. Walters(b)*, *Gabay v. Lloyd(c)*, *Palmer v. Blackburn(d)*, *Meres v. Ansell(e)*, *Hughes v. Statham(f)*. [*Bayley, J.* If parol evidence of the usage was admissible to explain the written contract in that respect, why was not parol evidence of the declarations of the bankrupt admissible to shew that the goods were not to be delivered till they were paid for, and to explain the written contract in that respect?] The latter would have gone further than explanation; it would have been in contradiction of the written contract: besides the rule as to admitting parol evidence of the usage of trade does not extend so far. But, supposing that the defendants ever had a lien, it arose out of a special agreement, which was put an end to by the sale, and the lien of course with it: for a factor's lien exists during such time only as he has possession of the goods, and if he parts with the possession after the lien has attached, the lien is gone. *Parry v. Dawson(g)*, *Sweet v. Pym(h)*, *Lickbarrow v. Mason(i)*. The hops were sold upon credit, therefore the property in them passed immediately to the buyer, and the seller had no lien: they were actually delivered to the bankrupt, and the defendants might at any time have brought an action against him for goods sold and delivered. [*Bayley, J.*

(a) 1 Ry. & Moo. 175.

(f) Ante, vol. vi. 219.

(b) 3 Camp. 16.

(g) 3 Anstr. 710.

(c) Ante, vol. v. 641.

(h) 1 East, 4.

(d) 1 Bing. 61. 7 Moore. 339, S. C. (i) 6 East, 27, n.

(e) 3 Wilson, 275.

Are you warranted in saying that they were actually delivered? They remained in the possession of the defendants. When they were over due, could the bankrupt have brought an action against the defendants for not delivering? It is submitted that he clearly could. [*Bayley, J.* The defendants would have had a right to stop the goods in their transitus to the bankrupt, or in the hands of a third person, upon discovering his insolvency; then had they not equally a right to stop them before their transitus began, and while they remained in their own hands?] It is submitted that they had no right of stoppage in transitu, and they certainly never entertained any design or intention of that nature. They delivered account sales to the bankrupt, and charged him commission and warehouse rent: all those acts combined, shew an actual delivery of the goods to the bankrupt. [*Bayley, J.* Is a seller bound to deliver goods to a buyer pursuant to a bargain, when he knows that if he does, he must of necessity lose both the goods and the price of them? [*Littledale, J.* In *Langfort v. Tiler (b)*, Lord *Holt* said this: "If a bargain be made, and earnest given, without an express agreement that payment is to be made at a certain time, the money must be paid upon fetching away the goods, and before they are removed, because no other time for payment is appointed. The earnest only binds the bargain, and gives the party a right to demand the goods; and a demand, without payment or tender of the money is void, for it is not pursuant to the intent of the bargain. After earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and if the vendee doth not come and pay the money agreed, and take the goods, the vendor ought to go and request him to do it; and then if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and the vendor may sell them to any other person"]. The jury have found that the

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(a) See *Tooke v. Hollingworth*, 5 T. R. 231.

(b) Rep. temp. Holt, 97. Salk. 113, S. C.

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contract was not rescinded, therefore, if by means of the contract the defendants at one time had a lien, it was at most but a strict lien: and then when the defendants resold the goods, they committed a tort, they were guilty of a conversion, they renounced their lien, and became liable to an action of trover for the goods. *Parry v. Dawson(a)*, *Jones v. Pearle(b)*, *Payne v. Brander(c)*. [*Bayley, J.* Surely the bankrupt could not demand the goods of the defendants without paying them their debt; and that exceeded the value of the goods]. It is submitted that he could, because the defendants had lost their lien. *Sweet v. Pym(d)*, *M'Combie v. Davies(e)*.

Abraham, contra. The defendants are not in a situation to resist this action, so far as it applies to the nineteen pockets of hops which were placed in their hands, as factors, for sale; and for the amount of that parcel, therefore, the plaintiffs, it is admitted, are entitled to a verdict. But for the rest of the hops they cannot recover. First, with respect to the parol evidence of the bankrupt's declarations, it was clearly admissible. They formed part and parcel of the contract, and when the credit had expired, without the money being paid, the defendants had a right to re-sell the goods. There are many cases in which it has been held, that parol evidence is admissible to explain a written instrument(*f*); and the evidence in this case went no further: for parol evidence shewing that the goods were not to be delivered until the money was paid, was no contradiction or variation of the written contract, it was merely an answer to other parol evidence of the usage to sell upon credit, and as such it was admissible. *Wiglesworth v. Dallison(g)*, *Senior v. Armitage(h)*. But, second, upon the principles of common law, the seller

(a) 3 Anstr. 710.

(c) 2 Stark. N. P. C. 568.

(e) 7 East, 7.

(g) 1 Doug. 201.


(b) 1 Str. 556.

(d) 1 East, 4.

(f) Phil. Ev. 479, et seq. 3d ed.

(h) Holt N. P. C. 197.

is not bound to deliver the goods, without being paid for them, and here the buyer having become insolvent, the defendants were entitled to deliver the hops at any moment before they got into the actual possession of the buyer, and the buyer had no right of possession until he paid the price. The plaintiffs, as assignees, cannot be in a better situation than the bankrupt himself would have been, and under the circumstances of this case it is impossible that he could have maintained any action against the defendants, without first paying them the price of the hops. At all events, the bankrupt, and the plaintiffs as his representatives, have sustained no actual damage, and therefore, even if the action can be maintained with respect to these hops, the plaintiffs can at most recover only nominal damages.

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The case was argued at the sittings before *Trinity* term last, when the Court took time for consideration; and judgment was now delivered by


BAYLEY, J.—This was an action of trover for a quantity of hops, part of which were sold by the defendants to the bankrupt previous to his bankruptcy, and part of which had been placed by the bankrupt in the hands of the defendants, as factors, for sale on his account. The question as to the latter stands upon perfectly distinct grounds from the question as to the former. The latter parcel of the hops consisted of nineteen pockets. None of them were sold till after the bankruptcy. After the bankruptcy, the defendants sold fifteen pockets, not on account of the bankrupt, or his assignees, not in discharge of any debt owing to them from the bankrupt as his factors, but in discharge of a claim which they considered themselves as having upon the bankrupt in respect of the other parcel of hops. The remaining four pockets the defendants refused to deliver to the assignees. It was candidly conceded in argument, and was, indeed, clear beyond all doubt, that the defendants were not justified in law in

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applying the proceeds of the fifteen pockets in the way they did apply them, and that they had no legal excuse for refusing to deliver up the other four pockets. For those nineteen pockets, therefore, the value of which is stated to be 9*l.* 19*s.* 5*d.*, we are all clearly of opinion that the plaintiffs are entitled to recover. But the first parcel stands on very different grounds. That consisted of hops which the bankrupt bargained to purchase of the defendants on three several days in the month of *August*, 1823, and for which the defendants gave the bankrupt bought notes in this form: "Mr. *John Robert Saxby*, of *Saunders, Parkes*, and Co.; *T. M. Simmonds*, eight pockets at 155*s.*, 8th *August*, 1823." Part of these hops were weighed, and an account of the weights, together with samples and bills of parcels, delivered to the bankrupt. The bought notes did not specify either the time for the delivery or for the payment of the hops, but it was proved at the trial that the usage in the trade was, to pay for hops purchased on the second *Saturday* after the purchase. It was also proved that the bankrupt had repeatedly declared that the hops were to remain in the possession of the defendants till they were paid for. Upon the argument of the case a question was raised as to the admissibility of the evidence, but as in one view of the case, it is not necessary to decide that question, I mention it only to dismiss it. Then, looking to the other facts connected with this transaction, as they appear upon the face of the special case, the question is whether the plaintiffs are entitled to recover for the value of these hops. On the part of the plaintiffs it has been urged that the property in these hops vested in the bankrupt immediately upon the sale; that the hops must be considered as sold on credit, and that, consequently, the defendants had no lien upon them for the price; that even if they ever had any lien, that lien was extinguished as to those which they sold, by the very act of selling them; and that the plaintiffs were entitled to recover the full value of those that were sold, without deducting the price

of those which they had sold to the bankrupt, and for which they had not been paid. With a view to decide the point thus raised, it becomes material to consider whether the property vested in the bankrupt to any or to what extent, and what were the respective rights of the bankrupt and of the defendants. Where goods are sold, and nothing is said either as to the time of delivery or the time of payment, and the seller's duty with respect to them is complete, the property vests in the buyer, and he is liable to the risk of any accident that may afterwards befall them. In such cases the seller is liable to deliver the goods, whenever they are demanded, upon payment of the price; but the buyer has no right to demand the possession until he pays the price: for the seller's right to the price is not a mere lien which he forfeits by parting with the possession, but arises out of his original ownership and dominion, and the payment or tender of the price is a condition precedent on the part of the buyer, without performing which he is not entitled to the possession. Where goods are sold upon credit, and nothing is said as to the time of delivery, the buyer is entitled to immediate possession; for both the right of possession, and the right of property vest immediately in him. His right of possession, however, is not absolute, but may be defeated by his becoming insolvent before he actually obtains possession. Whether his neglecting to pay the price at the expiration of the credit, where he has not obtained the actual possession, destroys his right of possession, and puts him in the same situation as if there had been no credit given, it is not necessary on this occasion to decide, because this is a clear case of insolvency; and in cases of insolvency it is quite settled law that the right of possession is lost, and that even where the seller has dispatched the goods to the buyer, he has a right to stop them in transitu. *Tooke v. Hollingworth*(a), *Hanson v. Meyer*(b), *Mason v. Lickbar-*

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(a) 5 T. R. 215.

(b) 6 East, 614.

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row(a), *Ellis v. Hunt(b)*, *Hodgson v. Loy(c)*, *Inglis v. Usherwood(d)*, and *Bohthrick v. Inglis(e)*. And why is this? It is because the property is vested in the buyer, so as to render him liable to the risk of any accident; but his right to the possession is not an indefeasible right, but one which is defeated by his becoming insolvent, and unable to pay the price. Then if the seller in cases of insolvency has a right to stop the goods in transitu, à fortiori he has a right to hold them, where he has never parted with them, and where no transitus has yet begun. The buyer, or his representatives, may regain the right of possession by payment or tender of the price, and they may still act upon their right of property, if that right is unfairly invaded. For instance, if the original seller re-sells the goods without authority, they may maintain a special action against him, and recover damages in proportion to any injury they may sustain by such wrongful sale; but they cannot maintain an action of trover for the goods, because in that form of action both a right of property and a right of possession are requisite, and they have not both those rights. *Gordon v. Harpur(f)*. This answers the argument respecting the charge for warehouse rent, and the non-rescinding of the sale. If the defendants were obliged by the act of the bankrupt to keep the hops in their warehouse longer than they ought, they were entitled to charge him with the expense; but that gave the bankrupt no better right of possession than he would have had, if no such charge had been made: and, indeed, the charge was not made till after the bankruptcy, when the defendants had already insisted that the property in the hops was transferred to the second buyer. The non-rescinding of the sale was in effect no more than the defendants insisting that they would not release the bankrupt from the obligations of his purchase; but it gave the bankrupt no further right than his purchase had previously given him,

(a) 1 H. Bl. 371.

(b) 3 T. R. 464.

(c) 7 T. R. 440.

(d) 1 East, 515.

(e) 3 East, 381.

(f) 7 T. R. 9.

which was only the right of possession upon payment or tender of the price. Here, there has been neither payment nor tender, and this being an action of trover for the goods, and not a special action for damage sustained by the wrongful sale, we are of opinion that it cannot be maintained as to these, but only as to the nineteen pockets, the value of which is stated to be 91*l.* 19*s.* 5*d.* The verdict, therefore, must be entered for the plaintiffs, for that sum only.

Judgment for the plaintiffs.

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BLOXAM and another, assignees of *SAXBY* a bankrupt
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TROVER for hops sold by the defendant to the bankrupt. A special case had been reserved, which it is unnecessary to set out, the facts being similar to those in the former cases, with the exception of some few distinguishing circumstances, all of which are fully pointed out in the judgment of the Court.

The case was argued at the sittings before *Trinity* term last, by *J. Evans* for the plaintiffs, and *Abraham* for the defendants. The line of argument was the same as in the former case. The Court took time to consider of their judgment, which was now delivered by

BAYLEY, J. This likewise was an action of trover, for a quantity of hops, which had been sold by the defendant to the bankrupt. The distinguishing circumstances between this and the former case are these: The bought notes here clearly shewed that the hops were sold upon credit, the contract being dated on the 19th of *August*; and specifying that the hops were to be paid for, one half by cash on the 30th of *August*, and the other half on the 6th of *September*. The defendant received from the

The purchaser of goods sold upon credit, cannot maintain trover for them without paying the price; for, though he acquires the right of property by the purchase, he can only acquire the right of possession by the payment: and, in order to maintain trover, he must have both the right of property and the right of possession.

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bankrupt a sum of 700*l.* in part payment for the hops; part of the hops at the time of the sale were in the warehouse of the defendant, and part in the warehouses of other persons, in the defendant's name. Upon discovering the bankrupts' insolvency the defendant re-sold the hops, part on the very day on which the act of bankruptcy was committed, and part after the issuing of the commission. The defendant never returned to the bankrupt, or to his assignees, the 700*l.*, or any part of it. No notice was given to any of the persons in whose warehouses the hops lay, to transfer them from the name of the defendant to that of the bankrupt, and in fact, they never were so transferred. In other respects this case was like the former. The question whether the bankrupt's declaration at the time of the sale, that the hops should not be delivered until they were paid for, was admissible in evidence, arose in this case as in the former; but as our opinion is in favour of the defendant, even assuming that evidence to be inadmissible, it is unnecessary for us to decide that question. This, like the former, was an action of trover for the full value of the hops, and it seems to us that the same principles which prevented the plaintiffs from maintaining the action in that case, operate also to prevent them maintaining this action against the present defendant. The hops which were originally in the defendant's warehouse, and which were allowed to remain there until they were re-sold, are precisely in the same situation as the hops which the bankrupt purchased of the defendants in the former case; and the hops which were originally in the warehouses of other persons in the defendant's name, and which were allowed to remain there without being transferred into the name of the bankrupt, are substantially in the same situation also. Upon the grounds detailed, therefore, in our judgment in the former case, we are of opinion that the verdict in this case must be entered for the defendant.

Judgment for the defendant.

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BIGGS and others, assignees of COLLIER, a bankrupt,
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ASSUMPSIT for goods sold and delivered, and on the money counts, alleging a promise made to the bankrupt before his bankruptcy; with a count on an account stated with plaintiffs, of money due to them as assignees, alleging a promise made to them *after the bankruptcy*, to pay the money then found to be due. Plea, that the bankrupt *before his bankruptcy*, sued out a writ against defendant, and declared against him, *upon the same identical promises* in the declaration in this suit mentioned, which said former suit is still depending. Demurrer to the plea, and joinder in demurrer.

Defendant in an action by assignees of a bankrupt, cannot plead the pendency of a former action brought against him by the bankrupt for the same cause of action; for the assignees have no power to proceed with the former action.

F. Pollock, in support of the demurrer. There are two objections to this plea. First, it states as matter of defence, the pendency of a suit by the bankrupt, which neither he, nor the assignees in his name, can carry on. The defendant might plead to that action the bankruptcy of the plaintiff puis darrein continuance. Upon this point, *Kinnear v. Tarrant* (a) is a decisive authority. Secondly, it states the former suit to have been upon the same promises and undertakings mentioned in this declaration. Now that is impossible, for the former action is stated to have been brought by the bankrupt *before* the bankruptcy, therefore, he could not have declared upon a promise made to his assignees *after* the bankruptcy. Here, there is a count upon such a promise. It will be urged that the promises are substantially the same, but that is not so, for the evidence which would support the one, would not support the other. It is quite impossible that evidence of an account stated with the bankrupt *before* his bankruptcy, could support a count upon an account stated with his assignees, as such, *since* his bankruptcy.

(a) 15 East, 622.

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Hutchinson contra The causes of action are the same, and the same evidence would support them both. A judgment in an action of trover may, in some cases, be a bar to an action for money had and received; that was decided in *Kitchin v. Campbell* (a). [Bayley J., Suppose the present declaration had contained only the count upon an account stated with the assignees; could they have recovered without giving evidence of some transaction since the bankruptcy?] It is submitted that they might, for the cause of action would have been the same; the same account may have been stated with the bankrupt *before*, and with the assignees *after*, the bankruptcy: and then the causes of action being substantially the same, the pendency of the one suit might have been pleaded in abatement of the other. *Boyce v. Douglas* (b).

BAYLEY, J. This plea is clearly bad with reference to the count upon the account stated, because the promise upon which that count is founded, did not, and indeed could not by possibility, form part of the declaration in the former action. This alone would be sufficient to decide the present case, because the plea being pleaded to all the counts, and being bad as to one, is bad in toto (c). But *Kinnear v. Tarrant*, is decisive of this case upon the merits. We cannot ascertain how far the bankrupt has proceeded in the action brought by him, but for aught that appears, the defendant would now be entitled to plead the bankruptcy in bar of it. The principles laid down by the court in *Kinnear v. Tarrant* have explained and corrected some former cases, in which it was held that assignees might proceed with actions commenced by bankrupts, and have decided that defendants may insist upon stopping such actions, and may compel assignees to become plaintiffs; and the reason of it is, that it may thus be made to

(a) 3 Wilson, 304.

(b) 1 Camp. 60.

(c) Vide ante, vol. iii. 441, 647.

appear upon the record, to whom the payment enforced by the judgment has been made. Then if assignees cannot proceed with a former action in the name of the bankrupt, it is clear that they may commence a new action in their own names; for else they would have no remedy at all. This plea, therefore, is bad, and the defendant must answer over.

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HOLROYD, J., concurred.

Judgment of respondent ouster.

JOHNSTON v. HUDDLESTON.

DECLARATION in replevin. Avowry for double rent of premises demised by defendant to plaintiff, from 26th *March*, 1821, for one year, and so from year to year, so long as plaintiff and defendant should please; and which plaintiff refused to give up possession of, and held over after the expiration of his own notice to quit. Plea in bar that the notice to quit was not in writing, and was given less than six months before the day therein specified for giving up the possession of the premises, that is to say, three months and six days only before the 25th *March*, 1824. Replication, admitting that the notice to quit was not in writing, and was given less than six months before the said 25th *March*, 1824, but averring that the demise was was not created by deed, but was a parol demise, and that defendant recognised, assented to, and adopted the notice to quit. Demurrer to the replication, and joinder in demurrer.

Declaration
in replevin.
Avowry for
double rent of
premises of
which plaintiff
was tenant
from year to
year to defend-
ant, and which
he held over,
after the expira-
tion of his own
notice to quit.
Plea in bar,
that the notice
was not in
writing, and
was given less
than six
months before
the day therein
mentioned for
quitting pos-
session. Re-
plication,

admitting the allegations in the plea, but averring that the demise was by parol, and that defendant recognized, assented to, and adopted the notice. On demurrer to the replication: Held, first, that the tenancy was not determined, the notice to quit being insufficient, and there being no surrender in writing, or by operation of law, within the Statute of Frauds. Second, that the landlord was not entitled to double rent, under the 11 *Geo.* 2, c. 19, s. 18. And third, that under this avowry, he could not recover the single rent, it not being part and parcel of the double rent avowed for.


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Patteson, in support of the demurrer. The general question in this case is, whether a landlord is entitled to distrain for double rent under the statute 11 *Geo.* 2, c. 19, s. 18, where the tenancy has not been determined by a six months' notice to quit. The affirmative of that question will hardly be maintained even in argument; first, because it is perfectly settled law, that a tenancy from year to year, which the tenancy in this case was, cannot be determined by any other than a six months' notice to quit; and second, because the particular question raised upon these pleadings, namely, whether the landlord's recognition and adoption of the notice to quit, made that notice binding upon the tenant to quit according to the terms of it, and thus entitled the landlord, upon the tenant's holding over, to distrain for double rent, is the only real question in dispute between the parties. Now, as a three months' notice to quit given by a tenant, cannot operate as a determination of a tenancy from year to year, so, the recognition and adoption of such a notice by a landlord, cannot make it operate as a present surrender of the tenant's interest. In this case the tenant had a subsisting interest in the premises when he gave the notice to quit, and the Statute of Frauds prevents such an interest from being surrendered, except by a note in writing, or by act and operation of law; as was expressly laid down by Lord *Ellenborough* in the case of *Mollett v. Brayne*(a). If the notice to quit was not immediately binding on the tenant, it was only an offer by the tenant to quit at some future period, which the landlord might either accept or refuse. If it was immediately binding, still it was only a mutual agreement for the tenant to quit at some future period, and did not amount to a surrender; for a "surrender is a yielding up of an estate for life or years to him that hath an immediate estate in reversion or remainder"(b). It is quite clear that these parties did not intend the agreement to operate as a surrender immediately from the

(a) 2 Camp. 103.

(b) Co. Litt. 337. b.

date of the notice ; and it is equally clear that the tenant did not intend it so to operate when the notice expired, because he then held over : but even if it did so operate, either at the one period or the other, that operation was the result of an agreement between the parties, and such a surrender must, by the Statute of Frauds, be in writing. Besides the validity of this very notice has already undergone discussion before the Court of Exchequer in the case of *Doe v. Johnstone* (a), where that court, after argument, decided that the notice was bad, and would not support an action of ejectment. It was proved in that case upon evidence, as it is admitted in the present upon demurrer, that the landlord had recognized and adopted the notice ; but the Court were nevertheless of opinion that there had been neither a valid notice to quit, nor a surrender by operation of law, and consequently that the tenancy was not determined, and the action was not maintainable. Then, assuming that the notice to quit was invalid, and that the tenancy was not determined, the only question is, whether the tenant by holding over, after giving such a notice to quit, renders himself liable to a distress for double rent. Now there is no case which goes the length of deciding that a tenant is liable for double rent, where his tenancy has not been determined by a valid notice to quit. It was held in *Timmins v. Rawlinson* (b), that a parol notice to quit at the end of three months, given by a tenant under a parol lease, was sufficient, and rendered him liable for double rent, if he held over ; but that case does not govern the present : for there nothing turned upon the validity of the notice, and it was admitted to be binding upon both the parties. *Messenger v. Armstrong* (c) is equally distinguishable from this case, for there the question arose upon a notice given by the landlord to the tenant ; and, though the report of the case describes it as an action for double rent, that is

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(a) 1 M^c Clel. & Yo. 141. (b) 3 Burr. 1603. 1 Bl. Rep. 533.

(c) 1 T. R. 53.

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certainly a mistake, and the action must have been for double value. [*Bayley, J.* The action there was certainly for double value; I have a note of the case which so describes it (a).] *Soulsby v. Neving* (b) likewise was the case of an action for double value, during the time the tenant held over after the expiration of the landlord's notice to quit. Lord *Ellenborough* there said, that there was no incongruity in a landlord's recovering double value after having recovered in an ejectment, because the 4 Geo. 2, c. 28, gave the double value as a penalty against the tenant for wilfully and wrongfully holding over after a notice to quit by the landlord; but that with respect to the 11 Geo. 2, c. 19, in which, where the tenant gives the notice to quit, and still holds over, double rent is given, there would be an incongruity in the landlord's recovering double rent, after the remedy by ejectment, which was a proceeding treating the defendant as a trespasser, and wholly inconsistent with the idea of the relation of landlord and tenant. *Farrance v. Elkington* (c) comes nearer to the present case. It was there held that if a tenant from year to year gives his landlord notice that he will quit upon a contingency, and does not quit when the contingency happens, he is not liable to an action on the 11 Geo. 2, c. 19, for double rent. Lord *Ellenborough's* language there is strikingly applicable here. He said—"I am clearly of opinion that the notice is not within the statute. It only amounts to this, that the defendant would quit when he found it convenient. There must be some fixed time mentioned, before the double rent can attach. *Would the landlord have been bound by this notice?* Could he let the house to another tenant on the contingency of the defendant's getting a situation to suit him? This attempt to recover double rent under the present circumstances is an experiment which had better have been avoided." Now, here, the notice would not have been binding on the landlord, therefore, the case comes

(a) And see Selw. N. P. 6th ed. 712, n.

(b) 9 East, 310.

(c) 2 Camp. 591.

expressly within the objection taken by Lord *Ellenborough*. This is an attempt by the landlord to obtain double rent, upon a notice to quit given by the tenant, of which he could not have availed himself, and by which he could not bind his landlord; and such an attempt, under such circumstances, would, in the emphatic words already quoted, "better have been avoided."

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Parke, contra. This is a valid notice. First, non constat, that it was not a notice to quit at the end of a half year. The plea alleges only that the notice was given less than six months before the 25th of *March*, 1824; now that may be taken to mean *calendar* months, and if so, there might be more than a half year's notice; and it has been held, that a notice for less than six calendar months is good; *Doe v. Green* (a), where Lord *Ellenborough* said, that a notice on the 29th of *September*, to quit at *Lady-day* following, had been holden good. [*Bayley*, J. But the expression here may mean *lunar* months; now six lunar months would not be sufficient, and I apprehend that they must be taken to mean lunar months, unless otherwise expressed]. But second, even if the notice is insufficient in itself, still, having been recognized and adopted by the landlord, it became sufficient to determine the tenancy, for two reasons: first, because both parties agreed to treat it as a reasonable notice, and second, because it operated as a surrender by operation of law. It could not, indeed, destroy the tenant's subsisting term for the current year; but it would prevent the commencement of a new term for the ensuing year. This is a tenancy from year to year, the nature of which Lord *Mansfield* thus describes in the case of *Right v. Darby* (b). "If there be a lease for a year, and by consent of both parties, the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to

(a) 4 Esp. N. P. C. 198.

(b) 1 T. R. 159.

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hold for a year. But then it is necessary for the sake of convenience, that, if either party should be induced to change his mind, he should give the other half a year's notice, before the expiration of the next or any following year." The necessity of a half year's notice is there put upon the ground of *convenience*, agreeing with what was said by *Wilmot, J.*, in *Timmins v. Rawlinson*, "that if a tenant takes from year to year, either party must give a *reasonable* notice before the end of the year; though that reasonable notice varies, according to the custom of different countries." A six months' notice would, generally speaking, be a convenient and reasonable notice; but as the notice may vary by custom, so it may likewise by the agreement of the parties. For this, *Shirley v. Newman (a)*, is a direct authority. There the landlord accepted a three months' notice from the tenant, without expressing either his assent to, or dissent from, such notice, but receiving the rent up to the period when the tenant quitted; and Lord *Kenyon*, held that that was presumptive evidence of an agreement that three months should be sufficient, and a waiver of a regular notice: saying that in the case of a tenancy from year to year, no notice short of six months, and determinable with the year, was sufficient, but that by agreement the parties might dispense with the notice, and the acquiescence of the parties was presumptive evidence of such an agreement." Again, this notice acted as a surrender by operation of law. In *Mollet v. Brayne* already cited on the other side, and in *Thomson v. Wilson (b)*, the notices were determinable in the middle of the current year, and the tenants having a then subsisting interest, could not possibly surrender their interest except by a note in writing. In that respect both these cases are very distinguishable from the present, and in *Whitehead v. Clifford (c)*, *Gibbs, C. J.*, said, "In *Mollet v. Brayne*, both parties did not act on the parol notice to quit, but

(a) 1 Esp. N. P. C. 266.

(b) 2 Stark. N. P. C. 379.

(c) 5 Taunt. 518.

the tenant only. It is very different from this, and we do not throw out any opinion against it; but when the like circumstances arise, it will be proper to consider them." If at *Christmas* the landlord had granted, and the tenant had accepted, a demise for a quarter of a year, that would clearly have operated as a surrender of the former term; and in legal effect, the notice here was a demise for a quarter of a year from *Christmas* to *Lady-day*, and therefore did operate as a surrender of the former term. In this view of the question, *Thomas v. Cook* is not to be distinguished from this case, and must decide it in favour of the landlord. Thirdly, even if the tenancy was not determined by either of the means now contended for, still the tenant having given a notice to quit, and having held over after the expiration of that notice, is liable to double rent, under the 11 *Geo. 2*, c. 19, s. 18. This is a case within both the mischief and the words of the enacting part of that section, for the tenant had the power of determining the tenancy, he gave a notice to quit for the purpose of determining the tenancy, and at the expiration of that notice, he refused to deliver up the possession. The two statutes, 4 *Geo. 2*, c. 28, and 11 *Geo. 2*, c. 19, are materially different in their language, and the latter cannot properly be construed with reference to the former. The former statute never recognizes the *tenant* by that name, and it requires a written notice to quit, and a formal demand of possession, by the landlord. The latter contains no such requisition; and does recognize the *tenant* by that name: and, moreover, gives the landlord the right of distraining for double rent; clearly shewing, therefore, that it contemplated a continuance of the tenancy after the expiration of the notice to quit. Lastly, the defendant is in any view of the case entitled to recover for the single rent, because, supposing the notice to be bad, the plaintiff has continued in possession as tenant, after giving an insufficient notice to quit, and is, therefore,

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liable at least for the single rent during the period he has so continued in possession.

BAYLEY, J.—I am of opinion that the tenancy from year to year was not determined by the notice to quit given in this case, and consequently, that the landlord is not entitled either to maintain ejectment, or to distrain for double rent under the 11 *Geo. 2*, c. 19, s. 18. I am further of opinion, that under this avowry he is not entitled to recover for the single rent. The avowry states the original tenancy to have been, not for one year only, but “from the 26th of *March*, 1821, for one year then next ensuing, and fully to be complete and ended, and so from year to year for so long a time as the defendant and the plaintiff should respectively please.” Therefore, at the expiration of the first half of every year, the tenant had an interest in the premises for a year and a half; and the term was to continue until some act was done to determine the tenancy. Now, by law, such a tenancy could not be determined without a half year’s notice to quit. It is said that there was such a notice here, for that the allegation in the plea that the notice was given less than six months before the 25th of *March*, 1824, may be taken to mean *calendar* months, in which case the notice may have been given more than half a year. But in all legal proceedings *months* must be taken to mean *lunar* months, unless the contrary is expressed, and as six lunar months would not constitute half a year, there has not been a half year’s notice in this case. When the tenant gave this notice, he had an interest in the premises for at least a year to come, which could not be put an end to by a parol notice to quit at the end of three months, because the Statute of Frauds expressly provides, “that no leases or estates, or interests either of freehold or terms of years, or any uncertain interest in any lands, tenements, or hereditaments, shall be surrendered, unless it be by deed or

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note in writing, or by act and operation of law" (a). It is next said, that even if a parol notice to quit at the end of three months cannot of itself determine a tenancy from year to year, still such a notice, given by a tenant, and recognized and adopted by a landlord, may operate as a surrender of the term by operation of law; and the case of *Thomas v. Cook* is relied upon as fully supporting that argument. Now what were the facts of that case, and how far do they bear upon the present? *Cook*, being tenant from year to year to *Thomas* of a house, underlet to *Perks* from *Christmas* 1816, and at *Lady-day* 1817, distrained upon *Perks* for rent. *Thomas*, having then a claim upon *Cook* for rent, gave notice to *Perks* not to pay his rent to *Cook*; took *Perks's* bill in payment of the rent due to himself from *Cook*, at the same time declaring that he would have nothing more to do with *Cook*; and afterwards himself distrained upon *Perks* for rent then in arrear. So that there was not only a declaration by the original landlord, that he no longer regarded *Cook* as his tenant, but an acceptance by him of another person as his tenant, which acceptance was assented to by the original tenant, who had previously given up the possession of the premises. The decision in that case, amounted, therefore, to no more than this: that where there has been an actual change of possession, and the landlord has agreed with the original tenant to accept the person in possession as his future tenant; there, the law, in order to give effect to the intention of the parties, will work a surrender of the original tenant's interest; as it does where a lessee for a term of years, during the term, accepts of a new lease from the lessor; but in the present case there was no change of possession, nor was there any act done by the landlord indicating that he considered the original term as ended; there is, therefore, no analogy between the two cases. Then, it is said, that the landlord assented to the notice, and so made it binding on himself. Assuming

(a) 29 Car. 2, c. 3, s. 3.

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that to be true, still his assent to the notice could not make it binding on the tenant, unless his assent was notified to the tenant; for without that, the notice was merely a proposal by the tenant to quit at some future period, which he had no power by law to compel the landlord to accept. But even if the landlord's assent to the notice had been notified by parol to the tenant, which does not appear upon the face of the pleadings, I am still of opinion that that would not constitute such an acceptance of the notice to quit as could operate as a surrender of the tenant's interest. If it operated as a surrender at all, it must operate as an actual surrender by virtue of an agreement between the parties, and not as a surrender by act and operation of law. But the Statute of Frauds requires such a surrender to be by note in writing, and therefore, in order to give the landlord's assent to the notice any effect at all, it ought to have been notified to the tenant in writing. For these reasons I am of opinion that there was no obligation upon the tenant to quit at the period stated in the notice, so as to entitle the landlord to maintain ejectment. The next question is, whether the notice to quit was so far binding upon the tenant, as to render him liable for double rent under the 11 *Geo. 2*, c. 19, s. 18. I am of opinion that it was not. I think the object of that statute was to give the landlord a remedy by double rent, only in cases where the tenant was bound to give up possession according to the terms of a regular notice to quit, upon which the landlord might have acted, and have maintained ejectment. It does not appear to me to have been the object of the legislature to punish the tenant for his caprice, but to remunerate the landlord for the loss of his bargain with another tenant. I think this is evident from the recital of the 18th section of the statute: "That whereas great inconveniences have happened, and may happen to landlords whose tenants have power to determine their leases, by giving notice to quit the premises by them holden, and yet refusing to deliver up the pos-


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session, when the landlord hath agreed with another tenant for the same? What inconvenience can happen to a landlord from receiving a notice to quit, which he is not bound by law to act upon? A tenant who has power to determine his tenancy by giving a notice to quit, is bound to give such a notice as the law requires; and if a landlord, acting upon an illegal notice, agrees with another tenant for his land, he acts without compulsion, and at his own peril. The language of the enacting part of the clause is, I must admit, somewhat stronger than that of the recital; but the clause must be construed altogether, and with reference to the particular mischief intended to be remedied. The enactment is, "That in case any tenant shall give notice of his intention to quit the premises by him holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant shall from thenceforth pay to the landlord double the rent or sum which he should otherwise have paid." That enactment, when construed with reference to the recital, can apply only to cases where the tenant gives such a notice as the recital describes; namely, a notice by which he has power to determine his lease, and by which his landlord is bound to accept possession of the premises; in other words, a regular, and legal notice. *Timmins v. Rawlinson* has been cited as an authority to shew, that a notice to quit given less than half a year before the arrival of the period mentioned in it, will entitle a landlord to sue his tenant for double rent. No such conclusion is, in my opinion, deducible from the decision in that case, because the lease there was alleged to be, not from year to year, but for one year only, and therefore the tenant was bound to quit at the expiration of that year, without any notice to quit being given. Lord *Kenyon* certainly does appear to have thought, in the case of *Shirley v. Newman*, that the fact of the landlord's agreeing to accept a three months' notice to quit was sufficient to determine the tenancy. But in

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the first place, the question arising upon the Statute of Frauds, was not brought under consideration there; and in the second place, that case differed from the present in this important particular, namely, that there the tenant actually quitted the possession of the premises. For these reasons, I am of opinion that the landlord in this case is not entitled to maintain an action for double rent under the statute. The last question is, whether, under this avowry, the landlord can recover the single rent. I am of opinion that he cannot. Where a defendant in replevin avows for more than is due to him, he may undoubtedly recover what is really due, if that is part and parcel of the larger sum for which he so avows. Here the defendant avows for double rent, due to him under the statute, in consequence of the plaintiff having held over, after giving a notice to quit. If any part of the double rent were due to him, I think he might recover that part under this avowry; but I think he cannot recover any single rent due to him by virtue of an agreement made between himself and his tenant, because that single rent cannot be considered as part and parcel of the double rent, for which he avows, as due to him under the statute.

HOLROYD, J., shortly expressed himself as being entirely of the same opinion.

Judgment for the plaintiff (*a*).

(*a*) *Littledale*, J., was absent.

CHARGE v. FARHALL.

A judge's order for staying proceedings must be drawn up forthwith, and


ASSUMPSIT on a promissory note. Before plea pleaded, the defendant obtained a judge's order for staying proceedings, until the plaintiff's attorney permitted the defendant's served immediately; otherwise it will not be binding.

agent to inspect and take a copy of the note on which the action was brought, the defendant undertaking to admit the signature thereto, and not to take any objection to the stamp. The order was not drawn up on the day it had been obtained, the defendant's agent having taken time to consult his client, who resided in the country. Before an answer could be received from his client, he filed a plea of the general issue, the plaintiff's attorney having in the mean time threatened, that unless the order was drawn up immediately, or a plea filed, he should sign judgment. Upon receiving the answer from his client, the defendant's agent drew up the order, and served it on the plaintiff's attorney, who treating it as a nullity, gave notice of trial for the ensuing assizes. The judges having then left *London* for their respective circuits; the defendant's agent prepared for trial pursuant to the notice served, but when he came to the assizes, he applied to the judge to postpone the trial, on the ground that the plaintiff was proceeding in violation of the order for permitting an inspection of the promissory note. The judge, under the circumstances then stated, postponed the trial accordingly. On a former day in this term a rule was obtained, calling on the plaintiff to shew cause why he should not pay to the defendant his costs in preparing to go to trial, the plaintiff having proceeded in the action notwithstanding the judge's order.

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Gurney now shewed cause, and contended that the defendant's delay in drawing up the order, was a waiver of it. A judge's order, to be binding, must be drawn up forthwith, and served immediately; otherwise, parties, by their own contrivance might gain time, which it was not in the contemplation of the judge making the order, to grant. The plaintiff was not bound to wait until the defendant's agent communicated with his client. He ought not to be prejudiced by that circumstance.

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Russell, contra. The delay in drawing up the order is no waiver. It was competent to the defendant's agent to write to his client in the country to know whether he would agree to the admissions stated in the order, before he drew it up. Nothing could be more reasonable; and in practice, time for such a purpose is generally allowed. Here the plaintiff's attorney knew that the order had been made, although not actually drawn up, and he had no right to force the defendant on to trial without complying with the order.

ABBOTT, C. J.—We are of opinion that this rule must be discharged. When a judge's order is obtained, it is the duty of the party obtaining it, to draw it up forthwith, and serve it immediately; and if he neglects so to do, it will not be binding. The neglect to draw up, and serve the order in this instance, was in my opinion a waiver. If the practice contended for were allowed to prevail, it might lead to great abuses, which it is the duty of the Court to prevent. Had the defendant's agent stated at the time he obtained the order, that it was necessary for him to have time to consult with his client, it might have been made a matter of stipulation; but nothing of that kind having been stated, I think the order was not binding under the circumstances.

Rule discharged.


The KING v. The INHABITANTS of NORTH CURREY.

"Inhabitant, or other," in the 43 *Eliz.* c. 2, s. 1, means, *resident inhabitant* or other *inhabitants*.


THIS was an appeal against a rate made for the relief of the poor of the parish of *North Currey* in the county of *Somerset*. The sessions amended the rate by striking out

Partners resident in one parish, but holding premises and carrying on business in another parish, by means of a servant who resides on the premises, are not *inhabitants* of the latter parish within the meaning of the 43 *Eliz.* c. 2, s. 1, and are not rateable to the poor of that parish, in respect of their *personal* property situate within it.

of it the sum of 16*l.* 13*s.* 4*d.*, to which the appellants had been assessed in respect of their stock in trade within the parish, subject to the opinion of this Court upon the following case :—

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The appellants, Messrs. *Stuckey*, *R. Bagshot*, and *T. W. Bagshot*, were partners in trade, and all residing in the parish of *Langport*, but carried on a considerable branch of their business in coals, culm, deals, and salt, in *North Currey*, by means of a foreman and other servants. The foreman and his family resided there, in a house on part of the premises on which the trade was carried on, belonging to the appellants, for which they were assessed as proprietors and occupiers in the rate appealed against, at 1*l.* 2*s.*, and they were also assessed for stock in trade at 16*l.* 13*s.* 4*d.* Neither of the appellants ever slept in the parish of *North Currey*, but they came there for the purpose of inspecting the foreman's accounts, and to see how the business was going on. On such occasions the acting partner used a small parlour in the foreman's house as a counting room, which the foreman in the absence of the appellants used when he had company. There were no sleeping conveniences kept for the appellants in the foreman's house, nor in any other part of the parish. The stock was received and sold by the foreman on the premises, and on every *Friday* the proceeds, with the accounts of the week, were sent to the partners at *Langport*, and returned, after inspection by them, to the foreman on the succeeding *Monday*. Accounts were also made up monthly, and sent to the partners for their inspection. The amount of the rate was one ground of appeal stated in the notice, but on the hearing of the appeal that was abandoned, and the ground stated and relied on, was, that the appellants were not liable to be rated for their stock in trade, they not being inhabitants of the parish of *North Currey*, nor otherwise liable for the same. The assessment on the wharfs, houses, &c., was submitted to without objection.

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Barnard and *Moody*, in support of the order of sessions, were stopped by the Court.

C. F. Williams and *Jeremy*, *contra*. The appellants are constructively *inhabitants*, and liable to this rate. They are not mere *occupiers*; and to hold that they are, will be to defeat the evident object and meaning of the 43 *Eliz. c. 2*. The recent case of *Rex v. Fryer* and others(*a*), will be relied on for the appellants as decisive of this case; they are however distinguishable. There, one of the part-

(*a*) M. T. 1825. Not reported, the case having been given up, without any adjudication by the Court. On reference to our notes, we find that case to have been as follows:—By a rate made on the 8th *May* 1824, for the relief of the poor of the parish of *St. James*, in the town and county of *Poole*; Messrs. *Fryer, Gosse & Pack*, were assessed for certain ships mentioned in the rate, for exports and imports, at the sum of 10*l.* 10*s.*, on the yearly value of 3,500*l.*, and upon cooper's stock, at 3*s.* upon the yearly average of 50*l.* On appeal, the sessions confirmed the rate, subject to the opinion of this Court on a case, which stated, that Messrs. *Fryer, Gosse & Pack*, were in partnership together as merchants, and were interested in equal thirds in the partnership stock and effects, and the vessels belonging thereto. The partnership business was carried on at *Poole* and at *Newfoundland*. At *Poole* they had a counting-house, and store houses, and a clerk used the counting-house, and kept the key, but did not sleep there. Mr. *Fryer* also carried on the business of a banker, with other persons, at *Wimborne Minster*, six miles from *Poole*, and his dwelling house was at *Wimborne*. The banking firm had also a counting-house and some other rooms, and a stable, in *Poole*, and a clerk of the banking partnership lived on those premises. The furniture in the rooms belonged to him, but the furniture in the counting-house belonged to the banking firm. Mr. *Pack*, one of the partners in the other firm, resided at *Newfoundland*. The rate was made upon the whole partnership interest in the exports and imports, in the coopers' stock, and in each of the said ships, and not upon the undivided third part or share of *Gosse* only. When the case was called on for argument,

Scarlett, who appeared to support the rate, admitted that two of the partners could not be considered as rateable inhabitants in respect of personal property, inasmuch as they were not resident within the parish, and therefore, on this concession, the rate was ordered to be sent back to the sessions to be amended, by striking out the names of the appellants.

ners was a resident of the parish, and rateable in his own character, and the servant in respect of whom the other partners were assessed, was not the servant of the whole firm; here the foreman was the servant of the whole firm, and unless the parties can be rated jointly, no person can be rated in respect of this property, and that will be a hardship, on the parish. [*Bayley, J.* Many mercantile firms have branch houses in various parishes, conducted entirely by servants; are they to be held rateable in all those parishes in respect of the inhabitancy of their servants? Your argument must go that length, if it is good at all]. Undoubtedly it must, and it is submitted that it is good to that extent. The meaning of the word *inhabitant* in the 43 *Eliz. c. 2.*, must be ascertained by considering the language and object of that statute, and its meaning as well per se as with analogy to other statutes that are in *pari materiâ*. The object is, to raise a fund for the relief of the poor of the parish, “by taxation of every inhabitant, parson, vicar, *and other*,” which words clearly shew that every person having ability in the parish, was intended to contribute, and that the word *inhabitants*, was meant to include all *householders* in the parish, whether actually residing there or not; and in favour of that construction there are many authorities. But what is the meaning of the act, considered per se? Lord *Coke* says, “*habitatio dicitur ab habendo, quia qui propriis manibus et sumptibus possidet et habet, ibi habitare dicitur*,” and adds, that the word *inhabitant*, is the largest word of the kind (a). So in the *Attorney General v. Parker* (b), Lord *Hardwicke* says, “*inhabitants* is still a larger word, taking in housekeepers, though not rated to the poor; it takes in also persons who are not housekeepers; as for instance, such who have gained a settlement, and by that means become inhabitants.” Again, what is the meaning of this statute when considered by analogy to other statutes imposing burdens upon *inhabitants*? It is expressly

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(a) 2 Inst. 702. See Carth. 119.

(b) 3 Atk. 577.

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declared by Lord *Coke*, in his commentary on the Statute of Bridges, that a person in possession of a house, occupied merely by his servants, is liable to pay the rates assessed upon it (a). In the *Mayor of Colchester v. Goodwin* (b), *Tyrrell, J.*, said, "he that hath a house in his hands *there* is said to be an inhabitant." In *Jeffrey's* case (c), the word inhabitant was construed in the same way, and the reason there given is, to prevent the rest of the inhabitants from being burdened beyond their just proportion, which would be the case if that portion of property in the parish on which the occupiers did not reside, was therefore not to contribute to the maintenance of the poor. In *Rex v. Clapp* (d), Lord *Kenyon* said, "the general object of the act was, to compel all those who had any property in the parish to contribute their due proportion towards the maintenance of the poor; and the receiving apprentices is one mode of contributing to their general relief. In construing these words, I see no reason for confining the power of binding on the *inhabitants* of the parish; they ought to be extended to persons occupying lands in the parish, though residing out of it." In *Rex v. Barwick* (e), it was held, upon the authority of *Rex v. Clapp*, that where several persons hold land in partnership, some of whom actually reside on and occupy it, and others reside at a distance, in another parish, the latter as well as the former, are bound to take parish apprentices. In *Rex v. Tunstead* (f), Lord *Kenyon* said, "the statute 43 *Elix.* uses the word "inhabitants," which has been held not to be confined to *resiants*; and Lord *Coke*, in his reading on 22 *Hen. 8*, c. 5, relative to the repairing of bridges by the *inhabitants* of counties, says, that the word "*inhabitants*" includes those who occupy lands in the county, though they do not reside there. For some purposes "*inhabitants*" and "occupiers" are synonymous terms. Where a person derives a benefit from property which he occupies in a

(a) 1 Carth. 119.

(b) 5 Rep. 66.

(c) 3 T. R. 113.

(d) 7 T. R. 33.


(e) 3 T. R. 524.

(f) 3 T. R. 532.

parish, he is liable to contribute to the ease of it ; and in *Rex v. Clapp* we observed, that this was one of the modes by which he was to contribute to the ease of his parish. This statute must be construed like other statutes that are in *pari materiâ*, and there are several which have received a construction fully supporting the present argument. By the Statute of Hue-and-Cry, 27 *Eliz.* c. 13, s. 5, two justices are to tax and assess, rateably and proportionably, according to their discretion, every town, parish, &c., within the hundred ; and after taxation made, the constables shall have power to assess according to their ability, every inhabitant and dweller in any such town, &c. ; and it has been held, that this tax might be levied upon one who had lands in his possession within the hundred, though he had no house nor lodging there ; *because he was an inhabitant, Leigh v. Chapman* (a). By the Riot Act, 1 *Geo.* 1, st. 2, c. 5, s. 6, the inhabitants of towns and hundreds are to yield damages for building or reparation, to be levied and paid in such manner as money recovered against the hundred, under the 27 *Eliz.* c. 13 ; and it has been held, that all persons having personal property within the district assessed, are inhabitants, and as such rateable ; *Atkins v. Davies* (b), where Lord *Loughborough* said, “ inhabitan-
 cy, in the sense of the legislature, upon this statute particularly, has been expressly determined not to be confined to the local residence of the person within the district ; but that, in the sense of the law, those are inhabitants who have taxable property within the district, in the very expression of Lord *Coke* in his second Institute ; those who have lands and tenements in their own possession, within the district, are to be deemed inhabitants ; and in a case in 2 *Saunders*, 423, *Leigh v. Chapman*, the same rule is laid down in the construction of this very statute.” In *Rex v. Hall* (c), it was held that a person might be a *householder* within the meaning of the *Bristol*

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(a) 2 *Saund.* 423.(b) *Cald.* 315. See, 5 *T. R.* 341.(c) *Ante*, vol. ii. 241. 1 *B. & C.* 123, *S. C.*


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every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, &c.; in the said parish, to be gathered out of the same parish, according to the ability of the same parish." It is contended that these appellants are liable to be rated under that enactment, either *as inhabitants* of the parish, or as persons coming within the meaning of the words *and other*. The latter words are certainly extensive, but it has never yet been held, that a person not within the description of *inhabitant* or *occupier*, was liable to be rated under those words, *and other*; and in the numerous cases respecting the rateability of tolls, the contrary has been constantly assumed and acted upon. Lord *Ellenborough*, in *Rex v. Nicholson*, treating of this subject, says (*a*), "Now *tolls* do not come within any one specification of occupancy described by the statute: they are not *land*, nor houses, &c. If, therefore, the owner be taxable for them at all, it must be as an *inhabitant* of the parish out of which they arise; but there is no case in which the word *inhabitant* in that statute has been held to mean any other than a resident within the parish. In the cases which have occurred of rating in respect of personal property (*b*), residence was considered necessary to constitute inhabitancy." It is plain, therefore, that he thought the words *and other*, carried the description of the persons liable to be rated no further than the former words. If that is the sound construction of the statute, as I think it is, the *only* question in this case is, whether the appellants are inhabitants of this parish, within the meaning of the statute. The word *inhabitant* is capable of bearing a very large and extensive sense, so large, indeed, as to comprehend every person possessed of property within the parish. I admit that it has occasionally been so construed, with reference, for instance, to the Statute of Bridges, the Hue-and-Cry act, and the Riot act. But why? Because in those statutes *inhabitants* is the only word used as descriptive of the persons intended to be made rateable, and

(*a*) 12 East, 342.

(*b*) Vide 8 East, 451, 5, 7.

from the very nature of the subjects to which it is there applied, it must have been designed to comprehend every person who had property within the district. Upon the same principle it has been held, that a person occupying land in a parish, but residing out of it, is compellable to receive a parish apprentice, though the statute of *Eliz.* provides that none but inhabitants *and* occupiers shall be compellable to receive one. But in the present instance there is a variety of words used as descriptive of the persons intended to be rated; they are, "every inhabitant, person, vicar, *and other*, and every occupier of lands," &c. If the word 'inhabitant' was meant to include the others, why were those others inserted and specified by name? The ground of the opinion of the court there was, that it did not include them, and that, 'inhabitant' there, had not the extensive meaning which had been given to it upon the construction of other statutes, but that it had a limited meaning, and was descriptive of persons residing within the parish, and of such persons only. Lord *Ellenborough's* judgment clearly proceeded on that ground; and *Le Blanc, J.*, said, "if the words of it (the stat. 43 *Eliz.*) had received so extended a construction as to include this case in the various decisions which have taken place upon the rating of the proprietors of canal navigations, I should have been disposed to adhere to the settled course of construction. But this point not having been decided in those cases, I cannot, upon advertng to the words of the statute, consider the appellant as coming within any of the descriptions of rateable there given. It is contended that he is an inhabitant of the township within the meaning of the act, and that he is also within it as an occupier of real property. Now when the word *inhabitant* is used as well as *occupier*, I must consider that by the former was meant a person who was resident within the place; for one might occupy without being resident, and the statute meant to include both." Mr. *Nolan*, in his *Poor Laws*

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also lays down the same principle (a). Then did the appellants *reside* in this parish? It seems to me impossible to contend that they did. What is the meaning of the word *resides*? A man *resides* where he eats, drinks, and sleeps and lives; where he has his domicile, where he makes his home. Not one of those characteristics is applicable to these individuals, and therefore I think they cannot be considered as resident within the parish. I also think, upon the authority of decided cases, that the word *inhabitants* in this statute, must be construed to mean *residents* only, and therefore, as the appellants are not resident within this parish, that they are not liable to be rated to the relief of its poor in respect of their personal property situate within it. For these reasons I am of opinion that the order of sessions must be confirmed.

HOLROYD, J.—I am of opinion that upon the proper construction of the statute of *Eliz.*, as now firmly settled by several decided cases, these appellants were not rateable to the relief of the poor, in respect of their personal property in the parish of *North Currey*. If there were no such decisions as those to which I have alluded, Mr. *Jeremy's* argument would be deserving of great consideration; but unless we are prepared to overrule all the cases in which non-resident proprietors of tolls have been held exempt from rateability, we cannot hold these appellants to be rateable, either under the word *inhabitant*, or the words *or other*: and I certainly am not prepared to do any such thing. In my opinion the words, *or other*, in this statute, must be construed to mean *other inhabitants*. I cannot conceive that it was the intention of the legislature to rate persons who were neither inhabitants of the parish, nor occupiers of property within it; and unless the word *inhabitant* means *resident inhabitants*, and the words *and other* mean *other inhabitants*, the subsequent words *occupier of lands*,

(a) 1 Nol. P. L. 72, 3d ed.

&c., must be wholly inoperative and useless. I take the case of *Rex v. Nicholson* to have been decided exactly upon that ground, and to have laid it down as a principle of law, that a proprietor of tolls is not liable to poor's rates, unless he is a *resident* inhabitant of the parish. Lord *Ellenborough*, during the discussion of that case said, "the great difficulty is to bring the case within the words of the statute 43 *Eliz.*, c. 2, conferring the authority. The party rated *must* be either an *inhabitant* of the parish, or he must be an *occupier* of one or other of the descriptions of property mentioned in the statute." He afterwards asked, whether any case could be found in which the word *inhabitant* in the statute of *Eliz.* had been held to mean any thing but *resident*; and in the course of his judgment he expressed himself satisfied that there was no such case to be found. *Le Blanc*, J., in the same case, seems to have been clearly of opinion that no person could be rateable who was not either a *resident* within the parish, or an occupier of *real* property there; and my brother *Bayley* said, "in a statute which mentions *inhabitant* as well as *occupier*, inhabitant must mean *resident*, otherwise it would mean the same as occupier." The case of *Williams v. Jones* (a) is another authority to the same point. Now the construction which we have been urged to put upon the words *and other*, would have applied as forcibly to those cases as to this, and if that construction is right, the decisions in those cases must be wrong. But I am of opinion that they are right; that the true construction of the words *and other* is other inhabitants; and consequently, that the appellants, not being such inhabitants, were not liable to this rate.

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Order of sessions confirmed (b).

(a) 12 East, 346.

(b) *Littledale*, J., was absent.

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A judgment for damages and costs in assumpsit, is a debt contracted within the meaning of the 46 G. 3, c. 135, s. 2, and proveable under a bankrupt's commission, though final judgment is not entered up until after the commission issues.

Exparte BIRCH, in the matter of LEDSTER, a Bankrupt.

THIS was a case sent by his Honor the Vice Chancellor for the opinion of this Court.


In *Hilary* term 1822, *William Birch*, of *Stockport*, in the county of *Chester*, sheriff's officer, commenced, in the court of King's Bench, an action of assumpsit against *John Ledster* the younger, the above-named bankrupt. The cause of action was stated in the declaration to be, that, in consideration that the plaintiff, as the bailiff of one *Edward Clayton*, would make a distress for rent in arrear, on certain goods, the property of one *Isaac Booth*, the defendant undertook that he had authority from *Clayton* to employ the plaintiff for the purpose of making such distress; that the defendant had no such authority, and that in consequence thereof an action of trespass quare clausum fregit, at the suit of *Booth*, had been brought against the plaintiff and three other persons, and a judgment recovered, and execution issued against the plaintiff and the other persons, for 20*l.* damages, and 66*l.* costs; under which execution the plaintiff's goods were seized, whereby he was compelled to pay, and did pay the said sums, together with the costs of the execution, and was also put to great expense in defending himself, and suffered great inconvenience from the seizure of his goods. Other counts stated the consideration to be, that the plaintiff would assist the defendant in making the distress, and the promise and damage was stated as before. Another, was on a promise to indemnify; and there was also a count for money paid. In fact, the distress was made by the plaintiff's directions, by his assistants, who were accompanied by the defendant. It was made at the defendant's request, on a false statement of his authority, and the plaintiff was compelled to pay, and did pay the damages, costs, and costs of execution to the party distrained upon, amounting

to 95*l.*, before the commencement of the action. In this action, *William Birch*, on the 4th of *June*, 1822, obtained a verdict against *John Ledster* the younger, the above-named bankrupt, damages 130*l.*, which verdict was entered generally; and on the 18th *June*, 1822, final judgment was signed on the above-mentioned verdict for 130*l.* damages, and 188*l.* costs. This judgment was signed as of *Trinity* term last, which in 1822 commenced *June* 7th. On the 15th *June*, 1822, a commission of bankrupt was awarded and issued against the said *John Ledster* the younger, the above-named bankrupt, founded on an act of bankruptcy committed by him on the 17th *May* preceding, being the act of bankruptcy in the proceedings; and on the 18th *June*, 1822, the commission was opened, and the bankruptcy found and declared by the commissioners. In *August*, 1822, the said *William Birch* presented a petition to the Lord Chancellor, praying that the said commission might be superseded, and the allowance of the said bankrupt's certificate might in the meantime be stayed; and, on the hearing of that petition by his Honor the Vice Chancellor, this case was directed, the question being, whether the said *William Birch* had, at the date and suing forth of the said commission, any debt proveable under the same.

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This case was argued on *Wednesday* the 3d *November*, at the sittings before *Michaelmas* term 1824.

Parke, for the petitioner. The question, under the circumstances set forth in the case, is whether *William Birch* had any debt due to him from *Ledster*, the bankrupt, at the time of suing forth the commission, which was proveable under the same. It is submitted, first, that the whole sum recoverable by the judgment against *Ledster* was proveable under his commission; and second, that at all events the sum of 20*l.* paid by *Birch* as damages in the action against himself is proveable as money paid to the bankrupt's use before the act of bankruptcy. First, as to

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the larger sum ; on the 4th *June*, 1822, *Birch* obtained a verdict against *Ledster* for 130*l.* ; and on the 18th *June*, final judgment is signed for that sum, together with costs, amounting to 188*l.* The judgment is signed as of *Trinity* term 1822, which commenced on the 7th *June*, and on the 15th *June* a commission of bankrupt is awarded against *Ledster*, founded on act of bankruptcy committed on the preceding 17th *May*. Now, as the judgment signed against *Ledster* relates to the first day of the term in which it was signed, it must be considered as a debt due on that day and proveable under the commission, although the act of bankruptcy was previous to the time the debt became due. As the judgment relates to the first day of term, it must be taken, as far as respects the bankrupt, to be a debt due from that time, although by the Statute of Frauds a purchaser would be protected ; *Robinson v. Tonge* (a). The case of *Buston v. White* (b), is also an authority expressly in point, to shew that the judgment signed in *Trinity* term relates to the first day of the term, and must be considered as a debt due from that time. In *Ex parte Charles* (c), nothing but a verdict had been obtained at the time the commission was sued out ; no judgment had been entered up ; but in that case there was this further distinguishing circumstance, that there the point arose as to the sufficiency of the petitioning creditor's debt. It will be said on the other side, that supposing this argument to be well founded, still this must be considered as a debt contracted after the act of bankruptcy, and therefore not proveable. But it has been held otherwise in the recent case of *Robinson v. Vale* (d), which arose upon the construction of the 46 *Geo.* 3, c. 135, s. 2. There the court was clearly of opinion that a judgment, even in an action for a tort, is a debt within the meaning of that statute, and proveable under a commission of bankrupt, although the final judgment was not signed

(a) 3 P. Wms. 399.

(b) 7 Price, 209.

(c) 14 East, 197.

(d) Ante vol. iv. 430. 2 B. & C. 762, S. C.

until after the act of bankruptcy committed (a). These, therefore, are authorities to shew that the whole sum recovered by *Birch* was proveable under the commission. Secondly, at all events, the sum of 20*l.* paid by *Birch* in the action brought against him by *Booth*, is proveable under the commission, as money paid to the bankrupt's use. [*Abbott*, C. J. Can you maintain that that money was paid by *Birch* to the use of the bankrupt?] It must be considered as money paid at the request of the bankrupt. By the act of the bankrupt, *Birch* is placed in the situation of being liable to pay that sum of money to *Booth*, and as he has paid it in consequence of that act, it must be treated as money paid at the request of the bankrupt. *Birch*, the officer, is an innocent party; he acts upon the authority which *Ledster* assures him he has of distraining on the property of *Booth*, and in consequence of being so placed in the situation of a wrong doer, he is compelled to pay those damages which *Ledster* would otherwise have been liable to pay had *Booth* brought his action against him. The effect of the payment by *Birch* is to exonerate *Ledster* from all liability to *Booth*, and therefore it is in effect money paid to his use and at his request. *Merewether v. Nixon* (b), *Brown v. Hodgson* (c), *Exall v. Partridge* (d).

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E. Alderson, contra. It does not appear upon the case that *Ledster* was liable to the party to whom *Birch* paid the 20*l.* The case only states that *Ledster* stated to *Birch* that he had authority from *Clayton* to employ him (*Birch*) for the purpose of making the distress on *Booth's* goods. It may be, that *Ledster* misrepresented his authority, but that does not shew that he took any part in the trespass committed by *Birch*, so as to make him liable for the damages

(a) See *Exparte Hill*, 11 Ves. jun. 646. *Buss v. Gilbert*, 2 M. & S. 70. *Walker v. Barnes*, 1 Marsh. 346. *Blogg v. Phillips*, 2 Camp. 139, and *Lee v. Goodlad*, ante vol. iv. 350.

(b) 8 T. R. 186.

(c) 4 Taunt. 189.

(d) 8 T. R. 308.

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which *Birch* paid as a compensation for distraining *Booth's* goods. The whole case therefore must depend upon the first point, namely, whether the judgment recovered in the action by *Birch* against *Ledster* is proveable as a debt under the commission. Now, it is submitted, that this is not a bonâ fide debt *contracted* within the meaning of the 46 *Geo. 3*, c. 135, s. 2. It is true, that *Robinson v. Vale* appears to be an authority directly in point against this proposition. The question there was, whether the defendant was entitled to be discharged out of custody on the ground that the damages and costs for which he had been arrested were a debt proveable under the commission, and that the defendant was protected by his certificate. The defendant had been arrested on the 17th *April* for the damages and costs in an action of trespass. On the 29th *January* the plaintiff had signed his final judgment; on the 23d of the same month the defendant had committed an act of bankruptcy; the commission was awarded against him on the 31st of the same month, and on the 3d *May* he obtained his certificate. The final judgment was signed between the time of committing the act of bankruptcy and the suing out of the commission, and the question was, whether it was a proveable debt, so as to protect the bankrupt by his certificate; and the court held that it was. So far, that case is in point with the present: but a most material authority bearing on the case was not brought before the court; for in *Blogg v. Phillips (a)*, Lord *Ellenborough* had previously decided exactly the reverse. That was an action of trover by the assignees of a bankrupt against the sheriffs. The goods in question were taken in execution by the defendants on the 7th *July*, and it was proved that the bankrupt had committed an act of bankruptcy in the *May* preceding, but that the commission was not sued out against him till the 1st *October* following. The goods were sold on the 20th *July*, and on the 30th of the same month, the money was paid

(a) 2 Camp. 129.

over to the person at whose suit they were taken in execution ; and the question was, whether the transaction was protected by the 46 Geo. 3, c. 135, s. 1, as a payment by the bankrupt, or a bonâ fide transaction with him, within the meaning of the statute ; and Lord *Ellenborough* said “ There is no pretence for calling this a *payment by the bankrupt*, and the meaning of the word *transactions* must be determined by the words used along with it, viz. ‘ contracts, and other dealings.’ The transactions protected by this clause of the statute are evidently transactions between the parties in the ordinary course of business, not transactions carried on through the medium of legal process.” This was the construction put upon the first section ; and the second section must receive the like construction, because it speaks expressly of debts *contracted*. That section enacts, “ that in all cases of commissions of bankrupt hereafter to be issued, all and every person and persons with whom the bankrupt shall have really and bonâ fide *contracted* any debt or debts before the date and suing forth of such commission, which, if contracted before any act of bankruptcy committed, might have been proved under such commission, shall, notwithstanding any prior act of bankruptcy may have been committed by the bankrupt, be admitted to prove such debt or debts, and to stand and be a creditor under such commission, to all intents and purposes whatever, in like manner as if no such prior act of bankruptcy had been committed by such bankrupt, provided such creditor or creditors had not at the time of such debt or debts being contracted, any notice of any prior act of bankruptcy by such bankrupt committed.” It is clear, from the language of this section, and from the decision in *Blogg v. Phillips*, that the judgment obtained by *Birch* cannot be considered as a *debt contracted* within the meaning of the statute. A contract imports a mutual agreement ; here there is none ; and if it be a debt at all, it must be by operation of law. But even if it were a debt contracted within the meaning of the

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statute, still it would not be within its protection, because the debt must be contracted without notice of a prior act of bankruptcy. Now here the fact of a commission having issued, which is a public act, is a sufficient notice to *Birch* that *Ledster* had committed an act of bankruptcy. But can a judgment for damages for a tort, be considered as a *debt contracted* within the provisions of the statute? It is clearly not within the words, and there is nothing to shew that it is within the spirit. Assuming it however to be a debt contracted, still the question is, when was it contracted? Now admitting it be true that the judgment shall have relation to the first day of *Trinity* term, still that which is a mere fiction of law, cannot alter the situation of the parties with respect to their legal rights. The question is, in what relation these parties stood to each other at the time the commission issued. The commission issued on the 15th *June*. Could *Birch* have maintained an action against *Ledster* at that time for the sum which he seeks to prove under the commission? If he could not, then he could not prove it under the commission as a debt contracted, and then due. The judgment is not signed until the 18th *June*, and therefore assuming it to be a debt contracted, it must stand in the situation of a debt created subsequent to the commission. This was the view taken of the question in *Walker v. Barnes (a)*, where the question was, whether the costs of an action could be discharged by the certificate; and *Gibbs, C. J.*, said, "the question cannot be tried by a better rule than by examining whether an action could be brought for the demand; and it is clear that no action could be brought before final judgment had been signed." [*Holroyd, J.*, In that case the statute 46 *Geo.* 3, c. 135, was not at all adverted to. It was considered as if that statute was not in existence, and nothing was said as to the operation of the judgment by relation]. The case seems, however, to have proceeded upon the question, whether a debt did or did not exist at the date of

(a) 5 Taunt. 778.

the commission. The case of *Burton v. White* was well decided, because there the judgment was actually entered up previously to the commission. On these grounds therefore, first, that a judgment in tort is not a *debt contracted* within the meaning of the act; and second, that if it is, still as it was contracted subsequently to the issuing of the commission, it is not a debt proveable against the bankrupt's estate:—the Court will be of opinion that *Birch* had no debt proveable under the commission at the time when it issued, and therefore a certificate to that effect must be sent into Chancery.

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*Parke*, in reply. First, the case of *Robinson v. Vale* is an express authority to shew that a judgment in tort is a debt within the meaning of the statute, and proveable under the commission, though not signed till afterwards; and second, the judgment having been entered up in *Trinity* term, it has by operation of law relation to the first day of the term, and consequently, as that is prior to the date of the commission, it must be considered as a debt contracted before the commission.

*Cur. adv. vult.*

The following certificate was afterwards sent by this Court to the Vice Chancellor.

“This case has been argued before us by counsel. We have considered it, and are of opinion that the said *William Birch* had, at the date and suing forth of the said commission against *John Ledster*, a debt proveable under the same.

C. ABBOTT.

J. BAYLEY.

J. S. HOLROYD.

J. LITTLEDALE.”

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## REID, IRWIN &amp; Co. v. HOLLINSHED and another.

A merchant in *London* authorises a broker at *Liverpool*, in writing, to purchase 1,000 bales of cotton, and propose to the latter, "to be allowed to be one third interested therein, acting in the business free of commission." To this proposition the broker accedes, and purchases cotton in his own name, which is paid for solely by the merchant in *London*. In the subsequent correspondence between the parties, the transaction is spoken of as "a joint account," "joint concern," "joint purchase," "joint speculation," joint cotton adventure." The broker effects insurances on the cotton against fire, and transmits the policies to the merchant, informing him that the cotton was deposited in warerooms rented by him (the broker) and that he held the key for their joint security. The broker pledges the whole of the cotton to the defendant, for a debt due to the latter, and becomes a bankrupt:—Held, that the broker was a partner with the merchant in the cottons, and that he had authority to pledge the whole to the defendant, as an innocent pawnee without fraud.

THIS was an action of trover for two thirds of 200 bales of cotton. Plea, not guilty. At the trial before *Abbott*, C. J., at the *London* adjourned sittings after *Michaelmas* term 1823, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:—

The plaintiffs were merchants in *London*, and the defendants were brokers in *Liverpool*. In the months of *February* and *April*, 1820, Messrs. *T. Davidson*, and *J. Milligan* of *Liverpool*, who traded under the firm of *Davidson and Co.*, bought 712 bales of cotton in different parcels. The following extracts from the correspondence between the plaintiffs and *Davidson and Co.*, shew the agreement under which they were bought, and the interest of each party. On the 11th *February*, 1820, the plaintiffs wrote to *Davidson and Co.*, as follows:—"In consequence of the representations made to us in your's, we hereby authorise you to purchase 1000 bales of bowed cotton of good quality, at the lowest price at which you can obtain it against your drafts on us at three months' date, you to be allowed to be one third interested therein, acting in the business free of commission." To this *Davidson and Co.*, on the 14th *February* 1820, returned the following answer:—"We are happy that you think favourably of an investment in cotton, and make due note of your order of 1000 bales of boweds. We shall be happy to hold one third interest therein, charging no commission; in expectation that you might authorise us to do something in this way, we picked up 137 bales on *Saturday* at 12*d.*, which we consider a bargain, and enter them accordingly to the joint account." On the 17th *February*, 1820,

the plaintiffs wrote to *Davidson* and Co. as follows:—  
“we duly note by your favour of the 14th inst., that you take one third share in the proposed purchase of 1000 bales of cotton, and that you have already secured 137 at what appear favourable terms. You must judge whether our *joint* speculation is still adviseable.” On the 23d *February*, 1820, *Davidson* and Co. wrote to the plaintiffs:—“We have this day purchased for the *joint* account 200 bags bowed cottons at 12*d.*, the quality is good, and we trust the purchase will meet your approbation.” The 200 bags so purchased, were those, two thirds of which were sought to be recovered in this action. On the 24th *February*, Messrs. *Davidson* and Co., wrote again to the plaintiffs, as follows:—“We have been tempted by the superior quality and condition of a lot of bowed cottons we fell in with to day, and have added to the *joint* concern 267 bales at 12½*d.*” On the 26th *February* they wrote and advised two drafts of that date, 975*l.* 13*s.* 8*d.*, and 861*l.* 6*s.* 5*d.*, at three months, which they required the plaintiffs to honour, and place to the debit of cotton “on *joint* concern.” On the 28th *February*, the plaintiffs wrote to *Davidson* and Co.:—“We have received your favours of the 23d, 24th, and 26th, and make due note of your purchases of cotton, and your drafts for 975*l.* 13*s.* 8*d.*, and 861*l.* 6*s.* 5*d.*, in part payment of the *joint* concern.” On the 4th *March*, 1820, *Davidson* and Co. wrote to the plaintiffs:—“We have now to advise our draft of this date for 2793*l.* 12*s.*, which please honour and place to the debit of the *joint* purchase of cotton.” To this the plaintiffs, on the 6th *March* 1820, replied:—“We pay due attention to the contents of your esteemed favour of the 4th inst., and to your draft for 2793*l.* 12*s.*, on the *joint* account.” On the 8th *March*, 1820, *Davidson* and Co. wrote to the plaintiffs:—“We have to advise our draft of the 6th, current for 3820*l.* 5*s.*, for the last purchase of cotton on the *joint* account.” On the 10th *March*, the plaintiffs replied:—“We have received your esteemed favour of the

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8th inst., and have made due note of your draft for 3820*l.* 5*s.*, on the *joint* account." On the 25th *March*, 1820, *Davidson* and Co. wrote to the plaintiffs, as follows:—"We now beg to enclose you the policies on the cotton purchased on *joint* account, one of them you will observe includes two lots not belonging to us. These cottons are all, of course, duty paid, and as such, never deposited in any public warehouse. The rooms in which they are stored are rented by us, and we hold the keys for *our joint* security." On the 29th *March*, the plaintiffs acknowledged the receipt of the policies by a letter containing the following passage:—"How is your cotton market now, generally, and how does it bear with reference to the prices given for this commodity recently on our *joint* account?" On the 4th *April*, the plaintiffs wrote to *Davidson* and Co., as follows:—"As we conceive a sufficient quantity of cotton has been purchased on this *joint* account, under present circumstances, we will not make any further purchases." On the 4th *August*, 1820, the plaintiffs wrote to *Davidson* and Co.:—"We would lose no opportunity of getting out of *our joint* adventure." On the 16th *September* 1820, the plaintiffs wrote to *Davidson* and Co.: "We have no opinion of cotton, and are desirous of *our joint* speculation being realized." On the 21st *September* 1820, *Davidson* and Co. wrote to the plaintiffs:—"We have not been able to make a beginning in the sale of the *joint* cotton, to day, but this matter shall have our constant attention until its close." On the 30th *November*, Messrs. *Davidson* and Co. wrote, with a remittance, to the plaintiffs, as follows:—"We beg to enclose you three bank post bills of 100*l.* each, which please carry to the credit of our *joint* cotton adventure." The remittance was duly acknowledged by the plaintiffs "to the credit of the *joint* adventure." Several remittances were afterwards made by *Davidson* and Co. to the plaintiffs of the proceeds of parcel of the cottons, when sold, which were remitted and received "to the credit of the *joint* account." Messrs.

*Davidson* and Co., purchased the cotton in their own names, in different parcels, from different merchants in *Liverpool*, and the invoices were made out by the sellers to *Davidson* and Co., as purchasers. The whole of the cotton was paid for by bills of exchange, drawn by *Davidson* and Co. upon the plaintiffs for the amount of the invoice cost, as the purchases were effected, and these bills were duly paid by the plaintiffs.

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Messrs. *Davidson* and Co. were general *American* commission merchants, and also transacted business upon commission, which was known to the defendants, who had been employed by them for many years; and they occasionally purchased goods on their own account. Part of the above-mentioned quantity of cotton, being the 200 bales in question, was deposited by *Davidson* and Co. in the warehouse of the defendants; and it was agreed between *Davidson* and Co., and the defendants, that the latter were to be employed as brokers to effect sales of this cotton. The defendants were in the habit of making advances from time to time to *Davidson* and Co. In the month of *January*, 1821, an advance of 1000*l.*; in the month of *March*, 1821, an advance of 1,500*l.*, was applied for by *Davidson* and Co., from the defendants, who made them, by giving their acceptances for those amounts. In consideration of such advances being made, *Davidson* and Co. pledged to the defendants, as a security, unknown to the plaintiffs, the 200 bales of cotton in question, which were at those times remaining in the defendants' warehouse. No funds were provided by *Davidson* and Co. to pay the bills, which were paid when due by the defendants. After this pledge of the 200 bales of cotton, and while it remained in the defendants' warehouse, *Davidson* and Co. became bankrupts, being largely indebted to the plaintiffs, on account of this particular speculation, (which was unsuccessful), as also upon a general account. At the time of the pledge of the cottons, and down to the period of the bankruptcy, the defendants were ignorant that any other

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persons than *Davidson* and Co. were interested in the said cotton. *Davidson* and Co., at the period of the bankruptcy, were indebted to the defendants in respect of the said advances, for which the said pledge was made, in more than the value of the said cotton. Before this action was brought, the plaintiffs demanded of the defendants the two thirds of the 200 bales of cotton, and tendered to the defendants the expenses for warehouse-rent and other charges thereon, and the defendants on such demand, refused to deliver the same. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover in this action.

*Kaye*, for the plaintiffs. This is a question of pledge; and it will not be disputed on the other side, that in such a case the pawnee of the goods can have no better title to them than the pawner himself had. The first point for consideration is, whether *Davidson* and Co. had any *property* in the cotton in question; and if they had, secondly, to what extent they were interested. In order to determine these points, it is necessary to look to the original letter of instructions from the plaintiffs to *Davidson* and Co. It is submitted, that from this letter it clearly appears that the cotton itself was the property of the plaintiffs, and that *Davidson* and Co.'s interest amounted only to one third of the *profits* of the speculation, if it should be successful, and which they were to be paid in lieu of their usual commission. The general dealings between the parties in respect of the cotton must be referred to, and governed by the terms of that letter, as shewing the principle on which the transaction was to be settled, and the interests of the parties mutually adjusted. By that letter the plaintiffs authorise *Davidson* and Co. to purchase for them 1000 bales of cotton, to be paid for by drafts drawn by *Davidson* and Co. upon them; *Davidson* and Co. to be allowed one third of the profits on the speculation, in consideration of their acting in the business with-


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out charging commission. This is the fair import of the letter, and it shews that *Davidson* and Co. were to be merely the agents in the transaction; they receiving for their skill, trouble, and time, in making purchases and effecting sales, one third of the profits, instead of a commission. It is not denied that the cottons were purchased with the money of the plaintiffs; and it cannot be pretended that *Davidson* and Co. were to be jointly interested in the cotton itself. They contributed none of their own funds towards the purchase money, and it is not to be supposed that the plaintiffs merely in consideration of *Davidson* and Co. giving up their commission, intended to give the latter one third share absolutely in the cotton itself. This is simply the case of a person employing a broker to purchase and sell goods, the former saying to the latter, "Instead of allowing you the usual commission and brokage, I will make you a present of one third share of the profits, as a compensation for your trouble." Such an arrangement would not make the broker jointly interested with his principal in the goods in specie, although it might give him a joint interest in the profits, if any arose from the sale. This case is precisely similar in principle to *Smith v. Watson (a)*, where a merchant employed a broker to purchase goods on speculation, and agreed to allow him a certain portion of the profits on the sale, as a remuneration for his trouble; and it was held that the broker could not be considered such a partner with the merchant, as to vest in him a property in the goods so purchased, or in the proceeds thereof, as against the assignees of the merchant after he became bankrupt, although as to third persons he might have been liable as a partner. Undoubtedly in that case the goods were purchased in the name of the principal; here they were purchased in the names of the agents; but still that can make no difference, the goods having been bought in point of law for account of the principals, and paid for with their money. The

(a) Ante vol. iii. 751. 2 B. &amp; C. 401, S. C.

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doctrine laid down in *Smith v. Watson* had also been established in two or three previous cases; *Meyer v. Sharpe* (a), *Hesketh v. Blanchard* (b). If then *Davidson* and Co. had no joint interest in the goods themselves, it is clear that they could not pledge them for a debt of their own, and therefore the pawnee has no title to retain them as against the real owner. The various extracts of letters inserted in the case, subsequently to the original instructions to *Davidson* and Co., are introduced by the defendants for the purpose of shewing, that the plaintiffs and *Davidson* and Co. were throughout the transaction jointly interested in the goods themselves; but those letters cannot by any intendment be construed to enlarge the effect of the original instructions, which clearly shew that it was not a joint adventure in anything more than the profits, or the profits and loss of the speculation; and the cases cited establish the distinction between a partnership in the goods themselves, and in the proceeds of the sale. Assuming, however, that these letters shew a joint interest in the goods themselves, then, secondly, the question is, to what extent *Davidson* and Co. were jointly interested? It is clear that their joint interest extended only to one third; and therefore to that extent only could they pledge. Here the plaintiffs seek to recover only two thirds of the 200 bales in question, and to that extent there can be no doubt they are entitled to recover. The principle applicable to a general partnership does not extend to this, which is the case of a single mercantile adventure; and the case of *Barton v. Williams* (c), is a direct authority to shew that *Davidson* and Co. could only pledge to the extent of their own share in the adventure. The doctrine laid down by *Best, J.*, in that case, goes the whole extent of what is now contended for. That learned judge is reported to have said, "A partner in a trading concern generally, may dispose of the partnership property, because his authority to do so is implied from the nature of his business; but that by no

(a) 5 Taunt. 74. (b) 4 East, 144. (c) 5 B. & A. 395.

means extends to a case of partnership in a particular instance." On either of these two grounds, first, that *Davidson* and Co. had no title or property in the cotton in question; and second, that at all events their interest did not exceed more than one-third of the amount, the plaintiffs are entitled to judgment for the two thirds for which this action is brought.

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*Parke* contra. The correspondence set out in the case, shews, from first to last, that *Davidson* and Co. were jointly interested in the cotton itself as copartners; and therefore, in the absence of all fraud on the part of the pawnees, it was competent to them to pledge the whole of the cotton. That they were partners in the transaction, at all events to the extent of one undivided third share, cannot be denied. If they were general partners in the transaction, they had authority to pledge the whole, in which case the defendants would be entitled to judgment; but if they were partners only to the extent of one undivided third part, then this action cannot be maintained, on the general principle of law, that one tenant in common cannot sue another at law. This action is not brought for the whole of the cotton, but for two undivided third parts, which is a plain admission by the plaintiffs, that *Davidson* and Co. were jointly interested with them in the cotton, at least to the extent of one-third share. Now the correspondence set out in the case, shews the agreement under which the cotton was purchased, the account upon which it was bought, and the interest of each party. By the first letter, the plaintiffs authorise *Davidson* and Co. to purchase 1000 bales of cotton; and in conclusion they say, "You to be allowed to be one-third interested therein, acting in the business free of commission." This is a plain proposition for a joint property in the goods, on condition that *Davidson* and Co. shall act in the business without commission. The answer by *Davidson* and Co. to this letter, is an acceptance of the



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proposition on those terms. Then comes the decisive letter from the plaintiffs, saying, "We duly note your favour of the 14th instant, that *you take one-third share* in the proposed purchase of 1000 bales of cotton, &c. You must judge whether our *joint* speculation is still advisable." These, and all the subsequent letters manifestly shew, that it was to be a joint speculation in the cotton, each party to bear his share either of the profit or loss. All the cases cited on the other side, are distinguishable from the present. In *Smith v. Watson*, it was proved that *Sampson* had entered into a verbal agreement with *Gill*, that the latter should purchase whalebone for the former as his broker, and that *for his trouble* he was to receive one-fourth share of the profit arising from each transaction, and bear one-eighth share of the loss, if any should arise. There, *Gill* was merely a broker, receiving so much of the profit for his trouble; and the goods were purchased in the name of his principal. Here, by the express terms of the contract between the parties, *Davidson* and Co. were to have a joint interest in the goods themselves, to the extent of one-third, and the goods were purchased in their own names. In *Meyer v. Sharpe* it was held, that an agent who is paid by a proportion of the profits of an adventure, does not thereby become a partner in the goods; and it was there proved, that the property of the goods was in the bankrupt alone. So in *Hesketh v. Blanchard*, the case was decided on the same principle. In that case A., having neither money nor credit, offered to B., that if he would order with him certain goods to be shipped upon an adventure, *if any profit should arise from them*, B. *should have half for his trouble*; B. having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by B. alone: It was held, that he was entitled to recover back such payment in assumpsit against A., who had not accounted to him for the profits; such contract not constituting a partnership as between

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themselves, but only an agreement for a compensation for trouble and credit; though B. were liable as a partner to third persons, creditors. In the present case, the correspondence shews an express agreement for a copartnership in the goods themselves. The plaintiffs were to contribute money; *Davidson* and Co. skill, time, and labour; and the profits were to be divided in certain proportions. Such a contract comes expressly within the definition of a partnership given in *Justinian's Institute*, tit. 26, *De Societate*:—"Nam et ita coiri posse societatem non dabitur, ut alter pecuniam conferat, alter non conferat, et tamen lucrum inter eos commune sit, quia sæpe opera alicujus pro pecunia valet." If, therefore, it be clearly established that there was in fact a partnership between these parties, it can not be disputed, as a proposition of law, that one partner may pledge the whole partnership property, without fraud, to an innocent party; and it makes no difference that the partner pledging has only a limited share in the joint property. Nor is there any distinction, for this purpose, between a special or particular partnership and a general partnership; because partners have not only a joint interest, but a mutual authority to bind each other by contracts with third persons relating to the partnership property, if there be no fraud on the part of those third persons; *Ex parte Bonbonus* (a), *Swann v. Steel* (b), *Raba v. Ryland* (c), *Tupper v. Haythorne* (d), *Ex parte Gellar* (e). Here, nothing like fraud can be imputed to the defendants, because, throughout the transaction, they knew nobody but *Davidson* and Co. as having any thing to do with the cottons; and, consequently, they must be taken to be innocent pawnees for valuable consideration. But, secondly, the plaintiffs being partners with *Davidson* and Co., they have no remedy at law, and this action cannot be maintained. The plaintiffs seek to recover two thirds

(a) 8 Ves. jun. 540. (b) 7 East, 213. (c) Gow. N. P. C. 132.

(d) Id. 135. (e) 1 Rose, 297.

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of the cotton in question, which is an admission that the remaining third was properly pledged to the defendants. The cases of *Raba v. Ryland*, and *Tupper v. Haythorne*, establish that *Davidson* and Co. being jointly interested in the cotton, they, in the character of partners, were legally possessed of the entirety and had a right to pledge the whole. Now it is clear that the legal interest in one third passed to the defendants, subject to an account. The consequence of that is, that the account must be taken in equity, and cannot be adjusted at law. For this, *Taylor v. Fields* (a), and *Parker v. Pistor* (b), are express authorities. In *Co. Litt.*, s. 322, it is said, "if two be possessed of chattels personal in common, by divers titles, as of a horse, an ox, or a cow, &c.; if the one take the whole to himself, out of the possession of the other, the other hath no remedy but to take this from him who hath done to him the wrong to occupy in common, &c., when he can see his time." The foundation of this action is the wrongful conversion of two thirds of the cotton; but there cannot be a wrongful conversion of two thirds, if the defendants have the rightful possession of one third; and the defendants are not bound to make partition, because as tenants in common they have an equal right of possession of the whole; *Brown v. Hedges* (c), *Holliday v. Camsell* (d), which are authorities to shew, that keeping possession under these circumstances is not a wrongful act. If the plaintiffs have any remedy, it is in equity. The case of *Barton v. Williams* is distinguishable from this, because, in the first place, there was no partnership in profit and loss; and in the second, there had been a partition of the goods, and the tenancy in common had ceased, so that the trover was well maintainable.

*Kaye*, in reply. The stress of the argument on the other side seems to be, that in this case the plaintiffs only seek

(a) 4 Ves. jun. 398.

(b) 3 Bos. & Pul. 289.

(c) 1 Salk. 290.

(d) 1 T. R. 658.

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to recover two thirds of the cotton. Now there have been three trials of this very case, and different questions have arisen in each. In the third action, the plaintiffs demanded the whole, and they were nonsuited, because their demand was too large. In the case of *Barton v. Williams*, the plaintiffs were obliged to make a similar demand, but no objection was made on that account. It may be admitted, that the plaintiffs and *Davidson and Co.* were tenants in common in the profits and loss of the speculation, but that will make no difference if they were not partners in the goods themselves. Now notwithstanding the argument on the other side on that point, it is still submitted that the correspondence set forth in the case will not establish that there was a partnership in the goods, —the point upon which this case must ultimately turn. It is not disputed, that the cottons were purchased with the plaintiffs' money, and the expressions in the first letter, "acting in the business free of commission," shew the footing on which the plaintiffs considered the transaction; for it is not usual for partners to charge each other commission. The other general expressions in the correspondence, such as "joint account, joint speculation," &c., are perfectly reconcileable with the idea of a partnership in the profits, but not in the cottons themselves, when regard is had to the terms of the first letter. No satisfactory reason can be assigned why the plaintiffs should consent to give *Davidson and Co.* a third share in the goods, for their skill and labour, instead of being allowed to charge a commission, because such a remuneration would be greatly disproportioned to any labour or skill which they might have occasion to employ in the purchase and resale of the cotton. But there is one fact which is quite decisive on this point, and which seems to have been forgotten on the other side, namely, that *Davidson and Co.* transmitted the fire policies upon the cotton to the plaintiffs, which shews, decisively, that they considered the plaintiffs to be the sole owners of the goods. The cases

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of *Raba v. Ryland*, *Tapper v. Haythorne*, and *Erparte Gellar*, are inapplicable ; because, in all, the purchase was joint, whereas here the purchase is made solely with the money of the plaintiffs. It is true, that the cotton was purchased in the name of *Davidson* and Co., but they appear not to have acted within the scope of their authority, for they had no right to purchase the cottons in their own names. But whether they did or did not do so, in fact, cannot affect this question. The Court will always keep in view that this is not a case of sale, but that of a pledge, which makes all the difference. If *Davidson* and Co. were not partners in the cotton itself, then all the arguments arising from a tenancy in common, and the cases cited in support of it, are wholly inapplicable. But even assuming that they were tenants in common, still it is submitted, that they having pledged the whole for their own debt, whereby they have placed the goods themselves out of the reach of their co-tenants, that amounts to a destruction of the subject-matter of the pledge, which will give a right of action against the pawnees.

*Cur. adv. vult.*

ABBOTT, C. J., now delivered judgment.—This case was argued before us during the present term. It was an action of trover brought to recover two thirds of two hundred bales of cotton. The defendants pleaded the general issue. The cause came on for trial before me, and a verdict was found for the plaintiff, subject to the opinion of the Court on the following case ; and there was liberty given to turn it into a special verdict, if the Court should think fit. (His lordship having read the special case, proceeded). Now on this state of facts, it appears that the goods were purchased by *Davidson* and Co., in their own names, and remained in their possession, and were pledged by them to the defendants, who advanced money on them without any knowledge of the plaintiffs' interest therein.

On the part of the plaintiffs, it was contended, first, that *Davidson* and Co. had not any interest in the corpus of the goods, either as partners, or part-owners, but only an interest in the profit and loss that might ultimately arise out of this speculation; and, secondly, that supposing *Davidson* and Co. to have any interest in the goods, still they had a property only in one third, and they could not make a valid pledge beyond that extent. We are of opinion that *Davidson* and Co. were interested as partners in these goods, and consequently, that the pledge of the whole made by them, without fraud or collusion on the part of the pawnee, gave a right to the pawnee to hold the goods as against the plaintiffs. We think the letters that passed between the plaintiffs and *Davidson* and Co., clearly shew that the parties understood this as a joint concern, or partnership in the goods. Such a partnership may well exist, though the whole price is in the first instance advanced by one party, the other contributing his time, and skill, and security, in the selection and purchase of the commodities. It is true that the plaintiffs, in their first letter, stipulate that *Davidson* and Co. shall act in the business "free of commission;" and this circumstance was relied on as making the present case parallel to that of *Smith v. Watson* (a); but the facts of that case are very different. In that case, it was stated to have been agreed between *Sampson* and *Gill*, a broker, that *Sampson* should buy whalebone, through *Gill*, as his broker; and that as a remuneration for his trouble, *Gill* should have one fourth of the profits arising from the sale, and bear one eighth proportion of the losses. Goods were bought under this agreement which produced a profit. After the close of the transactions under it, *Sampson* entered into other speculations, and continued to employ *Gill* as a broker, and upon these *Gill* was to receive one-third of the profits; but whether he was to bear any portion of the losses did not appear. All the witnesses stated, that *Sampson*

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(a) Ante vol. iii. 758. 2 B. &amp; C. 401, S. C.

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so in the present case, it being obligatory on the defendant to take care that he does all that the practice of the Court requires him to do. Here the defendant was in default by not perfecting his bail in due time, and therefore the bail-bond was well assigned, the moment the rule for setting aside the process in the original action was discharged.

*Comyn, contra.* By the practice of the Court, the defendant, had the same time to put in bail after the rule for setting aside the process was discharged, as he had when the rule nisi was obtained. That rule was obtained on the 10th *November*. It is clear that the defendant had then the whole of the 11th *November* to put in his bail. Then, as the rule was to *stay the proceedings*, which rule was not discharged until the 21st, he had the whole of the 22d to perfect his bail. This is the general rule of practice. The defendant could not know whether he was bound to perfect his bail until the rule was disposed of; and as soon as the fate of it was known, he does all that the practice of the Court requires, by perfecting his bail. This rule of practice is perfectly analogous to the case of a bill of particulars, which is, in fact, an illustration of the reasonableness of what is now contended for.

BAYLEY and HOLROYD, Js.(a), were clearly of opinion that the "stay of proceedings" mentioned in the rule nisi, obtained on the 10th *November*, had not the effect of enlarging the time for putting in and perfecting the defendant's bail, until the 22d inclusively; the defendant ought to have put in his bail instanter, or as soon as he reasonably could. The rule which he had obtained only stayed the *plaintiff's* proceedings; but it did not give the defendant the indulgence of any extended time to do what he was bound to do by the practice of the Court immediately. If this were not the sound construction of the rule, a door would be opened to great delay in similar cases.

(a) *Littledale, J.*, was on the winter circuit.

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This was not like the case of a summons to stay proceedings until particulars of plaintiff's demand are delivered, or where there is some act to be done by the plaintiff; for there the delivery of the particular, or the act to be done, depends upon the plaintiff himself; and it would be but reasonable that the defendant should have the same time after summons as before, because he could not plead until the particulars were delivered, or the act done, which the plaintiff was called upon to do. Under these circumstances, the plaintiff's proceedings were regular. But in as much as the defendants swore to a good defence, upon the merits, the rule might be made absolute for staying the proceedings on the bail-bond, upon paying the costs of those proceedings, and the costs of this application.

Rule absolute accordingly.


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**INDICTMENT.** The first count charged, that defendant, on, &c., with force and arms, at the parish of, &c., in the church-yard and church of the said parish, unlawfully, wilfully, and contemptuously, did interrupt, hinder, and obstruct, *William Cecil*, clerk, in reading the order for the burial of the dead, and interring the corpse of *John Dawes*; and did then and there unlawfully, wilfully, and contemptuously, by threats and menaces, prevent and hinder the burial of the said corpse according to the rites and ceremonies of the church of *England*; and did then and there unlawfully, wilfully, and contemptuously lay violent hands upon *J. C.*, and *J. W.*, in the said church, in the peace of God, and our lord the King, then and there being. The second count was the same, only omitting the

Indictment charging "that defendant in a church-yard, unlawfully interrupted and obstructed *W. C.*, clerk, in reading the order for the burial of the dead, and interring a corpse, and unlawfully, by threats and menaces, hindered the burial of the corpse :"—

Held bad in arrest of judgment; first, for not averring that *W. C.* was a clerk in holy orders, and lawfully acting as such in the burial of the corpse; and, second, for not setting out the particular threats and menaces used by defendant.



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allegation that defendant laid violent hands upon *J. C.* and *J. W.*, and describing *William Cecil* as "the said *William Cecil*." The defendant pleaded not guilty. At the trial before *Alexander, C. B.*, at the *Cambridgeshire* summer assizes, 1824, the defendant was found guilty upon the second count only.

*Storks*, in *Michaelmas* term 1824, obtained a rule to shew cause why the judgment should not be arrested, upon the ground that the indictment was insufficient in two respects: first, in not averring that *Mr. Cecil* was employed in the execution of his office as clerk, at the time of the alleged interruption; and second, in not setting out the particular threats and menaces alleged to have been used by the defendant. Against this rule cause was now shewn by

*F. Pollock, Robinson, and Dover.* The obstructing the clergyman *in the execution of his office*, is not the gist of the offence charged by this indictment; therefore the objections taken to it, do not apply. Where the obstructing an officer in the execution of his office, is the gist of the offence, as in the case of a justice of the peace, a constable, &c. (a); there, an allegation that the party was in the legal execution of his office at the time is necessary; but here, that is merely a collateral circumstance. If *Mr. Cecil* was not in the execution of his office, all the averments in this indictment fail together. [*Bayley, J.* You propose, therefore, to render this indictment good by intendment; but it is a rule of law that an indictment shall not be rendered good by intendment]. This is a necessary intendment, and therefore not within the rule. Unless *Mr. Cecil* was duly qualified, and legally acting as a clerk in holy orders, the corpse could not have been buried "according to the rites and ceremonies of the church of *England*;" therefore, it must be presumed that

(a) See Andr. 226.

he was. But at least the indictment contains in substance this allegation, that the defendant, by threats and menaces, interrupted and hindered the burial of the dead; and that in itself is an illegal act, for which an indictment will lie. In *Jones v. Ashburnham* (a), Lord *Ellenborough*, alluding to the act of arresting a dead body, says, "it is contrary to every principle of law and moral feeling; such an act is revolting to humanity, and illegal." In *Rex v. Lynn* (b), the case of one *Young* is mentioned, where the master of *Shoreditch* workhouse, a surgeon, and another person, were indicted for a conspiracy to prevent the burial of a person who died in the workhouse. In *Andrews v. Cawthorne* (c), *Abdy*, J., in delivering the opinion of the Court, said, "the burial of the dead is (as I apprehend) the clear duty of every parochial priest and minister; and if he neglect or refuse to perform the office, he may, by the express words of the Canon 86, be suspended by the ordinary for three months. And, if any temporal inconvenience arise, as a nuisance from the neglect of interment of the dead corpse, he is punishable also by the temporal courts, by indictment or information. H. 7, G. 1, B. R., that court made a rule on Mr. *Taylor*, rector of *Daventry*, in *Northamptonshire*, to shew cause why an information should not be filed, because he neglected to bury a poor parishioner who died in that parish." (d). Then, as the burial of the dead is a duty prescribed by law, a clergyman in the performance of that duty is performing a lawful act, and the averment of his qualification is unnecessary. [*Bayley*, J. If a mere stranger were to enter a church for the purpose of burying a corpse, would it be any offence at law for the churchwarden to threaten to prosecute him in the Ecclesiastical court?] Certainly not, because that would not be an unlawful interruption. But this indictment charges the defendant

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(a) 4 East, 465.

(b) 2 T. R. 733. See *Rex v. Cundick*, ante vol. i. 356.

(c) Willes, 538, n.

(d) See Burn's Eccl. Law, *Burial*.

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with an unlawful interruption, and sets out facts which, *primâ facie* at least, amount to an indictable offence; it was for the defendant therefore to prove at the trial, that his acts did not amount to an offence at law; and that he has not done. The requisites to a good indictment are, "first, that the party accused shall be apprised of the charge he is to defend; second, that the Court may know what judgment is to be pronounced according to law; and third, that posterity may know what law is to be derived from the record." *Rex v. Holland (a)*. Now all these requisites concur in the present indictment: for it avers that Mr. Cecil was a clerk; that he was in the execution of a lawful act; and that the defendant unlawfully interrupted, and by threats and menaces unlawfully hindered him from completing the execution of that act. Upon these grounds it seems clear that this indictment is sufficient, and consequently that there is no pretence for arresting the judgment in this case.

*Storks*, in support of the rule, having cited *Hawkins's P. C.*, b. 2, c. 25, s. 60, and *Rex v. How (b)*, was stopped by the Court.

BAYLEY, J.—It is clearly laid down in the passage referred to in *Hawkins*, and it is also a sound and established rule of criminal pleading, that no material averment in an indictment can be supplied by implication or intendment. Applying that rule to the present case, it seems to me that this indictment is manifestly bad, because it does not sufficiently describe the unlawful act imputed to the defendant, and does not possess that degree of certainty which every indictment ought to possess. It begins by charging that the defendant "unlawfully did interrupt, hinder, and obstruct *William Cecil*, clerk, in reading the order for burying the dead, and interring the corpse of *John Dawes*." Now, an interruption is not necessarily an


(a) 5 T. R. 622.

(b) Str. 699.

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indictable offence ; nor does that allegation necessarily imply that the performance of the service was entirely prevented : the indictment ought to have gone on to shew in what manner, and to what extent, the defendant interrupted Mr. Cecil, so that the Court might see plainly what offence they were called upon to punish, and the defendant what offence he was called upon to answer. It goes on to charge that the defendant “ did unlawfully, by threats and menaces, prevent and hinder the burial of the said corpse ; ” but it does not describe what those threats and menaces were, or what was their operation. I have already suggested the possible case of a stranger attempting to bury a corpse, and being threatened with a prosecution in the spiritual court for so doing, as shewing that the burial might be interrupted by threats and menaces, without any illegal act or any indictable offence being committed. It is argued that it is enough to allege that the burial was *unlawfully* interrupted ; but I think that it is not enough, without going on to shew *how* the interruption was unlawful. Upon this part of the case *Rex v. How* is an authority in point. There the indictment charged that defendant “ quendam N. Carew, being a justice of peace in the execution of his office, per diversa scandalosa, minacia et contemptuosa verba, abusus fuit, et ipsum in executione officii sui prædicti vi et armis illicitè retardavit. *Strange* admitted the indictment to be bad as to the words, but insisted it was good as to the obstructing the justice in the execution of his office. Et per Curiam, this is bad in toto. Retardavit will hardly warrant calling this an obstruction ; but if it would, surely some act or other should be set out.” That case is precisely like the present, except, indeed, that it is somewhat stronger ; for there it was alleged that the officer was acting in the execution of his office, which is not alleged here. Here, there is no averment that Mr. Cecil was a clerk in holy orders, or that he was lawfully acting as such in burying the corpse, or that the corpse had been lawfully


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brought to the church for burial. It is argued that we must presume all those facts, because otherwise the corpse could not have been buried, in the words of the indictment, "according to the rites and ceremonies of the church of *England*." Even if such a presumption could properly arise, which however I do not mean to admit, still that would be to render an indictment good by intendment, which as I have before observed would be a violation of a fundamental rule in Criminal Pleading. For these reasons I am of opinion that this indictment is bad, and that the rule for arresting the judgment ought to be made absolute.

HOLROYD, J., concurred.

LITLEDALE, J., was absent on the winter circuit.

Rule absolute.

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The KING v. The Company of Proprietors of the DUDLEY Canal Navigation (a).


By the statutes 16 G. 3, c. 66; 25 G. 3, c. 87; and 30 G. 3, c. 60, the *Dudley Canal Company* was incorporated, but none of these

acts contained any clause respecting the mode in which the company should be assessed to parish or other taxes. By the 33 G. 3, c. 121, the old proprietors and certain new ones were re-incorporated, for certain purposes, with the same powers as were given by the previous acts, to which reference was made; and this act for the first time empowered the company to make *collateral cuts*. By the s. 34, it was enacted, that the said Company of Proprietors should from time to time be rated to all parliamentary and parochial taxes and assessments, for or in respect of the land and grounds *taken and used* by the said company, and all warehouses and other buildings erected, or to be erected by the said Company of Proprietors, *as other lands, grounds, and buildings, lying near to the said canal and collateral cuts*, were or should be rated:—Held, that this clause was not to be construed retrospectively, so as to divest the parish of K. of the right of assessing the canal to the relief of the poor, by including in the rateable valuation *the profits derived from the company's tonnage dues*.

BY a rate made for the relief of the poor of the parish of *Kingswinford*, in the county of *Stafford*, the defendants were rated thus: "*Dudley Canal Company*, 12*a*. 2*r*. 36*p*. 1,000*l*. 4*l*. 13*s*. 4*d*., for canal towing path, ton-

(a) This case was decided in *Easter* term, but the manuscript had been mislaid.

*nage dues, &c.*" Upon appeal, the sessions confirmed the rate, subject to the opinion of this Court upon the following case:—

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By 16 Geo. 3, c. 66, entitled, "An act for making and maintaining a navigable canal, within and from certain lands belonging to *T. T. Foley*, esq., in the parish of *Dudley*, in the county of *Worcester*, to join and communicate with the *Stourbridge* Navigation, at a place called *Black Delph*, upon *Pensnet Chase*, in the parish of *Kingswinford*, in the county of *Stafford*," it was enacted, that certain proprietors therein named, should be united into a company for the better carrying on, making and maintaining the said canal, according to the rules, orders and directions thereafter prescribed, and should for that purpose be one body politic and corporate by the name of the Company of Proprietors of the *Dudley* Canal Navigation, and by that name should have perpetual succession.

By 25 Geo. 3, c. 87, entitled, "An act for extending the *Dudley* canal to the *Birmingham* canal, at or near *Tipton Green*, in the county of *Stafford*," reciting 16 Geo. 3, c. 66, and also, that the extending of the said *Dudley* canal, from the then present termination thereof in the lands of the said *T. T. Foley*, to join the *Birmingham*, and *Birmingham* and *Fazeley* Canal Navigations, at or near *Tipton Green*, in the county of *Stafford*, would be of great public utility, and that certain persons therein mentioned, had agreed to bear the expense of such extension, and that it had been agreed, for the better and more effectual execution thereof, that such persons should be joined with the Company of Proprietors, and that the said extension should be carried on and performed under their joint direction and management, and that after the said extension should be completed, the same should become one joint concern; it was enacted, that certain persons therein named, should after the passing of that act, be united and incorporated with, and become part of the Company of Propri-

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etors of the said *Dudley* Canal Navigation, and should have the same power of voting, benefits, &c., and should be liable to the same charges as if they had been appointed part of the Company of Proprietors of the *Dudley* Canal Navigation, by 16 *Geo.* 3, c. 66. By section 3, it was further enacted, that the 16 *Geo.* 3, c. 66, and the several powers, authorities, clauses, provisos, limitations, exceptions, privileges, penalties, forfeitures, punishments, matters, and things therein contained, for making, completing, preserving, and maintaining the canal and other works thereby authorised to be done, so far as the nature and circumstances of the case would admit, should be used and exercised by the said Company of Proprietors, and should be employed and enforced for making, completing, preserving, and maintaining the said canal thereby authorised to be made, and also for doing all such other works, &c., as the said Company of Proprietors should think necessary for the benefit of the said undertaking. By the latter part of section 18, it was enacted, "that from and after the making and completing the said intended canal, the shares created by virtue, or in pursuance of that act, should become consolidated with the shares in the then present *Dudley* Canal Navigation, and all distinction between the same should cease and determine; and the said *Dudley* canal, and all matters and things relating thereto, and the canal and other works to be made and completed by virtue of that act, should from thenceforth be and become one joint navigation and concern, and the whole of the income and profits arising from such joint navigation and concern, should be paid unto, and equally divided among, all and every the proprietors thereof, according to their respective shares therein."

By 30 *Geo.* 3, c. 60, entitled, "An act for more effectually carrying into execution the said acts of 16 and 25 *Geo.* 3," the Company of Proprietors were empowered to raise more money for the purpose of completing the said canal.

By 33 Geo. 3, c. 121, entitled, “ An act for making and maintaining a navigation canal from the *Dudley* canal in the county of *Worcester*, to the *Worcester* and *Birmingham* canal now making, at or near *Selly Oak* in the said county, and also certain collateral cuts to communicate therewith ;” reciting the said acts of 16, 25, and 30 Geo. 3, and that the said Company of Proprietors, had in pursuance thereof, made and completed the said canal, and the extension thereof, and that the making and maintaining of a navigable canal from the said *Dudley* canal at *Netherton*, in the parish of *Dudley* aforesaid, to join the *Worcester* and *Birmingham* canal, and also certain collateral cuts therein described, would be of great public utility ; it was enacted, “ that the several persons therein named, should be, and were thereby united and incorporated with, and made part of the Company of Proprietors of the *Dudley* Canal Navigation, and should have the same power of voting, and also the same benefits, &c., in all respects, and should be liable to the same costs and charges, &c., as if they had been named and appointed part of the Company of Proprietors of the *Dudley* Canal Navigation, in and by the said recited acts, or any of them ; but, nevertheless, under and subject to such regulations as were thereafter expressed and contained, of and concerning the same.” By section 2, it was further enacted, “ that it should be lawful for the said Company of Proprietors, and they were thereby authorised to make and perform all such works and things as should be requisite for making, completing, and maintaining the said canal and collateral cuts, and the navigation thereof, and for supplying the same with water, in as full, ample, and beneficial a manner, to all intents and purposes, as the said Company of Proprietors were authorised and empowered to do, execute and perform, under and by virtue of the said recited acts, with respect to the said *Dudley* canal, and the extension thereof, and the several powers, &c., in the said acts or any of them contained, as far as the nature

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of the case would admit, should be used and exercised by the said Company of Proprietors, and should be employed and enforced for making, completing, preserving, and maintaining the said canal and collateral cuts thereby authorised to be made, and supplying the same with water; and also for making, erecting, and doing all such other works, matters, and things, as the said Company of Proprietors should think necessary or expedient for the benefit of the said undertaking; and also should be used and exercised by the owners and proprietors of mines lying upon or near to the said intended canal and collateral cuts, with respect to such railways and cuts as should be necessary or expedient to be made, for conveying their coals and other minerals to and from the same; and that the said persons who were appointed commissioners for putting the said recited acts in execution, should be commissioners for the purpose of that act in like manner, and as fully and effectually to all intents and purposes, as if the several powers, &c., appointment of commissioners, matters and things, in the said recited acts, and which were then in force, were repeated and re-enacted in the body of that present act; and as if the canal, collateral cuts, and other works by that act intended to be made, completed and maintained, had been part of the canal, and other works by the said recited acts intended to be made, completed, and maintained." By section 17, to the end that the said Company of Proprietors might be the better enabled to carry on the said undertaking, it was enacted "that it should be lawful for the several persons thereinbefore named, and made part of the Company of Proprietors of the *Dudley* canal, together with such of the then present proprietors of the said *Dudley* canal, as had subscribed to raise money among themselves, or the said Company of Proprietors might admit other subscribers towards raising a certain sum therein mentioned, for making and completing the said intended canal and collateral cuts in manner therein mentioned; and all other persons, their executors,

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administrators, and assigns, who had or should become subscribers towards carrying on and completing the said intended navigation, should be entitled to, and should receive after the said navigation should be completed, a proportion of the profits arising as well from the said intended navigation, as from the said *Dudley Canal Navigation*, according to the number of shares, not exceeding the number therein mentioned; and every body politic or corporate, person or persons, having such property in the said undertaking, should respectively be deemed proprietors in the whole concern, in proportion thereto, and should bear and pay an adequate sum of money in proportion to every such part or share which they or he should be possessed of, towards carrying on the same." By section 34 it was enacted, "that the *said Company of Proprietors*, should from time to time be rated to all parliamentary and parochial taxes and assessments, for or in respect of the land and grounds *taken and used* by the said company, and all warehouses and other buildings erected, or to be erected by the said Company of Proprietors, *as other lands, grounds, and buildings lying near to the said canal and collateral cuts, were or should be rated.*"

Neither the 16, nor the 25, nor the 30 Geo. 3, contains any clause respecting the mode in which the said company should be assessed either to the parliamentary or parochial taxes. The rates of tonnage which the said company are empowered to take, are different upon the several parts of the canal. That part of the canal which lies in the parish of *Kingswinford* was made under the 16 Geo. 3, and occupies 12a. 2r. 36p. of land. No part of the canal lying in the parish of *Kingswinford*, has ever been rated for *tonnage dues*, before the rate which is the subject of appeal was made.

The question for the opinion of the Court is, whether the 34th section of the 33 Geo. 3, c. 121, extends to all parts of the canal made in pursuance of the several acts of parliament before mentioned, so as to render all parts of it

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rateable only as the adjacent lands, without including in the rateable value, the profits derived from the *tonnage dues*.

*Gurney, Campbell, and Corbett*, in support of the order of sessions. This case depends upon the construction to be given to the 34th section of the 33 Geo. 3, c. 121, which enacts, that "the said company shall from time to time be rated to all parliamentary and parochial taxes and assessments, for or in respect of the land and grounds *taken and used* by the company, and all warehouses or other buildings erected, or to be erected by the said company, *as other lands, grounds, and buildings lying near to the canal and collateral cuts*, are or shall be rated." The question is, whether this section prevents the overseers of the parish of *Kingswinford*, from including the profits derived by the company from their tonnage dues, in the rateable value of that part of the canal passing through the parish, and confines the company's rateability to a valuation, estimated with reference to the mode in which other lands lying near the canal are rated. It is quite clear, that between the 16 Geo. 3, the date of the first act, and the 33 Geo. 3, when the last act passed, the canal was liable to be rated on the same principle as other land in the parish was rateable, namely, according to the improved annual value. It is submitted, however, that the 34th section, on which the question arises, makes no difference in the principle of rating, and that as a clear liability to be rated in respect of the profits arising from tonnage dues, attached in the first instance, it is not extinguished by any thing contained in that section. There being a vested right in the parish to rate the company upon this principle, previously to the passing of the last act, nothing but a clear, unambiguous, and comprehensive provision on the subject, can operate to divest it of that right. These acts of parliament, are in the nature of contracts between the company and the public, and are to

be construed strictly, especially if the object be to extinguish vested rights. All the acts prior to the 33 Geo. 3, c. 121, are silent as to the mode in which the company should be rated, and the question is, whether the 34th section of that act, is to be construed prospectively or retrospectively. If the latter be its operation, the sessions have improperly confirmed the rate; but if it is merely prospective, their decision is right. Now the most intelligible and consistent interpretation to be put upon the section is, that the legislature meant it to apply to lands and grounds *intended to be* taken and used by the company for the purposes of the canal, and not lands and grounds which *had theretofore been taken* for those purposes. This is the necessary inference to be drawn from the language used, because the object of the 33 Geo. 3, was to create a new company, by combining the old with certain new proprietors, and that act for the first time mentions "collateral cuts." Therefore, when the 34th section mentions "lands and grounds *taken* and used by the said company," it must mean land and ground *intended* to be taken and used by the *new* company, for the purpose of making the canal and collateral cuts. No other construction can be put upon the section without depriving the parish of the right previously vested in it, of rating the company according to the improved value of their canal, which cannot be effected without clear, express, and unambiguous language. They cited *Rex v. The Grand Junction Canal (a)*, and *Rex v. The Birmingham Canal (b)*.

*Scarlett, Russell, and Whateley*, contra. This is entirely a question of construction, and effect must be given to the plain object of the act of parliament, which was to render all parts of the canal made in pursuance of the several acts set out in the case, rateable only as the adjacent lands would be rateable, without including in the assessment the profits derived from the tonnage dues. The

(a) 1 B. &amp; A. 289.

(b) 2 Id. 570.

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intention of the legislature in passing the 33 Geo. 3, was to incorporate the old with the new concern, and make it one entire undertaking. Therefore, when the legislature makes use of the expressions "said company," in the 34th section, as terms of reference, it means the whole concern, as one entire undertaking. If the legislature had meant that section to have a prospective operation, it would have said so, and would have used terms importing futurity. The words "land and grounds *taken and used*," are clearly expressed in the past tense, and mean land and grounds which *had been taken and used*, and not land and grounds "to be taken," or "hereafter to be taken and used." This must be treated as a declaratory law, applicable to all former acts, and giving the words their plain meaning, they are to be construed retrospectively, and if so, then the order of sessions ought to be quashed. No notice is taken in the act of vested rights, and therefore, it cannot but be understood that the object of the legislature was to make a general rule as to the mode in which this company should be rated. The company has never been rated before upon the principle on which they are now sought to be assessed, and this is an experiment to charge them with a liability never thought of before.

ABBOTT, C. J.—It is perfectly clear that before the passing of the 33 Geo. 3, c. 121, the parish of *Kingswinford* had a right to rate the *Dudley Canal Company*, according to the improved value of the canal, by reason of tonnage dues arising on coals and other commodities passing through the parish; and I take it to be a sound rule, when an act of parliament is applicable to the subject under consideration, that it should not be construed so as to have the effect of defeating and destroying pre-existing rights. If the words of the 34th section of this act, or some of them, are reasonably capable of being applied to something prospective, or something to be afterwards done by virtue, and under the authority of the act, then it seems

to me that this company has been rated in the parish of *Kingswinford*, on the right footing. There is, I admit, considerable ambiguity in this section, but it is by no means clear, as is assumed, that it is to have a retrospective operation. I observe that in six or seven different instances, these expressions "*said canal and collateral cuts*," are used. These expressions occur again in the section in question. Then are we to extend the words "*said canal and collateral cuts*," to that part of the canal previously made, or are we to limit them to the "*said canal and collateral cuts*," *intended* to be made under the authority of this act? I think we ought to put the latter construction upon this 34th clause. It is not unimportant, in construing these words, to observe, that in the series of acts of parliament which have passed respecting this canal, the first mention of *collateral cuts* occurs in the 33 Geo. 3, c. 121. The 16 Geo. 3, c. 66, is only an act for making the *Dudley* canal, and does not make any provision for collateral cuts. The 25 Geo. 3, c. 87, is for extending the *Dudley* to the *Birmingham* canal, but says nothing about collateral cuts. The 30 Geo. 3, c. 60, was passed merely for the purpose of more effectually carrying the previous acts into execution. But the 33 Geo. 3, c. 121, which is the act in question, is an act "for making and maintaining a canal navigation from the *Dudley* canal to, &c., and also certain collateral cuts to communicate therewith." These are the words of the title. Then finding in this act of parliament new words designating this canal by the expressions "*said canal and collateral cuts*," I must say, (though the expression "*intended*," which is sometimes used in these acts, is omitted), in the difficulty of finding any other sensible exposition of words so doubtful, that the sound rule is to hold, that they mean works *intended* to be made, and that they shall not have a retrospective operation, applicable to works previously made, which would have the effect of taking away from the parish that right of rating the canal, which before that

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time existed and was vested in the parish by law. For these reasons, I am of opinion that the sessions have done right in deciding that this company is rateable in the parish of *Kingswinford*, not merely according to the value of the adjoining lands, but according also to the improved value of that part of the canal passing through the parish derived from the tonnage dues. It is not unimportant to observe, that this act of parliament passed at the instance of this Company of Proprietors, who are afterwards authorised to carry its provisions into execution; and it is not too much to say, that if persons of that description, are introducing new bills before the legislature, and mean thereby to take away rights previously vested, they shall manifest their intention by using clear, explicit, and unambiguous words for that purpose, in order that the legislature may have an opportunity of thoroughly understanding the provisions which they are called upon to enact.

BAYLEY, J.—I consider it a most useful and salutary rule of construction, in cases of this description, that when the object of the act of parliament is to impose a burthen, or to take away a right, such language must be proved to have been used, as shews most unequivocally that it was the intention of the legislature that the burthen should be imposed, or the right taken away. Now in the present case, if it had been the intention of the legislature to deprive the parish of *Kingswinford*, and all other parishes through which this canal passes, of the right which they possessed of rating the company, at the time the act passed, I should have expected some recital upon the subject, shewing plainly and distinctly, that such a purpose was in contemplation. The language which the legislature has used in this act, is certainly inadequate for that purpose. The 33 Geo. 3, c. 121, after reciting the previous acts, authorises the Company of Proprietors “to make and perform all such works and things as should be requisite for making, completing, and maintaining the *said*

*canal and collateral cuts*, and the navigation thereof, and for supplying the same with water in as full, ample, and beneficial a manner to all intents and purposes, as the *said Company* of Proprietors were authorised and empowered to do, execute, and perform, under and by virtue of the said recited acts," &c. What is meant by the *said company*? This act clearly has reference to the new company. There had been an old company, and the act constitutes a new company by the addition of certain new proprietors. The statute, therefore, clearly means that the lands and grounds, &c., taken by the said *new* company, for making and completing the canal, shall be subject to the same regulations as were provided by the previous acts, as far as the nature of the case would admit. It never was the intention of the legislature to interfere with any thing, except to put the lands and grounds taken by the new company, under the same management and control, to which the lands and grounds taken by the old company, were subjected. We must construe the 34th section prospectively and not retrospectively, and therefore, giving effect to that construction, I think that the company is rateable not only with reference to the value of the adjacent lands, but that the profits derived from the tonnage dues, must be included in the rateable value.

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HOLROYD, J., concurred (a).

Order of sessions confirmed.

(a) LITLEDALE, J., was absent.





## PICKARDO v. MACHADO.

*Quere*, Whether a *British* Consul, resident in a foreign port, has authority to take an affidavit of debt for the purpose of holding a party to bail in this country. The judges equally divided in opinion upon the point.

Affidavit of debt made in *Spain*, that the defendant is indebted to the plaintiff in so many pounds *sterling*:—Held ill by three judges, for not going on to say, “pounds *sterling English*,” for, non constat but that it may be *Irish sterling* money; *Abbott, C. J.*, dissentiente.

THE defendant in this case, a native of *Spain*, and residing in this country temporarily, had been arrested and held to bail in the sum of 100,000*l.* by an order of the Lord Chief Justice upon an affidavit of debt, for money had and received to the plaintiff's use, which affidavit was made by the plaintiff, and purported to have been sworn at *Cadiz*, in the kingdom of *Spain*, before the *British* Vice Consul there resident. In the affidavit of debt, the money, in respect of which the defendant was arrested, was described as “one hundred thousand pounds *sterling*,” without going on to add “*British money*.”

*Gurney* had obtained a rule nisi to discharge the defendant out of custody, on two grounds; 1st, that a *British* Vice Consul resident abroad has no authority to administer an oath for the purpose of holding a person to bail in this country; and, 2dly, that the affidavit was too uncertain in the description of the debt, inasmuch as the word *sterling* was applicable to *Irish* and some foreign monies, as well as *English*. As to the first point, he denied the position laid down in *Beawe's Lex Mercatoria* (a) to be any authority for this proceeding, it being there said *British* Consuls abroad are authorized to take affidavits of debt, and that during their absence the Vice Consuls are vested with the same power; and with respect to *Thurlt v. Faber* (b), though the point there incidentally arose, it was never decided. As to the materiality of the second objection, he cited *Kearney v. King* (c) and *Glossopp v. Jacob* (d). .

*Scarlett* and *F. Pollock* shewed cause against the rule.

(a) Beames, 6th ed. 521, &c.

(c) Id. 28.

(b) 1 Chit. R. 463. 2 B. & A. 301.

(d) 1 Stark. 68.

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As to the first objection, it will not be denied, after the decision of *Omealy v. Newell*(a), that an affidavit of debt made by a plaintiff residing in a foreign country, before a foreign magistrate, whose signature to the jurat, and his authority in that country to administer oaths and take affidavits, are verified by a proper affidavit in this country, is a sufficient foundation for a judge's order to hold a defendant to special bail, notwithstanding the 12 Geo. 1, c. 29. The question then is, whether an affidavit of debt made by a plaintiff before a *British* Vice Consul in a foreign country, is a sufficient authority for holding a debtor to bail in this country, provided the affidavit be correct in point of form. In the case of *Thurlt v. Faber*(b), this point arose, but was not decided, inasmuch as the case went off upon an objection to the want of addition to the name of the Chief Consul, whose affidavit was produced for the purpose of verifying the hand-writing of the Vice Consul abroad; but it may be stated as a fact, that upon that affidavit being amended in the defect objected to, a detainer was lodged against the defendant upon the original affidavit made before the Vice Consul, and the legality of the detainer was never afterwards questioned. Whether upon inquiry it was found that no objection could be successfully made to it, it is unnecessary to inquire, but the fact was as stated; and it is remarkable that in the discussion of the case, as reported in the book cited, the Court having asked the defendant's counsel what he had to say with respect to the authority which appeared to be vested in Vice Consuls to take affidavits of debt, he waived all consideration of that point, and confined himself to the objection in point of form. But assuming this question not to have been decided by that case, the stat. 6 Geo. 4, c. 87, removes all difficulty upon the subject. Section 20 of that act, after reciting that "whereas it is expedient that every Consul-General, or Consul, appointed by his Majesty at any foreign port or

(a) 8 East, 364.

(b) 1 Chit. R. 463.

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place, should in all cases have the power of administering an oath, or affirmation, whenever the same shall be required, and should also have power to do all such notarial acts, as any notary-public may do," proceeds to enact, "that it shall and may be lawful for any and every Consul-General or Consul, appointed by his Majesty, at any foreign port or place, whenever he shall be thereto required, and whenever he shall see necessary, to administer at such foreign port or place any oath, or take any affidavit, or affirmation from any person or persons whomsoever, and also to do and perform at such foreign port or place, all and every notarial acts or act, which any notary-public could or might be required, and is by law empowered to do within the United Kingdom of *Great Britain and Ireland*; and every such oath, affidavit, or affirmation, and every such notarial act administered, sworn, affirmed, had, or done by or before such Consul-General, or Consul, shall be as good, valid, and effectual, and shall be of like force and effect, to all intents and purposes, as if any such oath, affidavit, or affirmation, or notarial act respectively, had been administered, sworn, affirmed, had, or done before any justice of the peace, or notary-public, in any part of the United Kingdom of *Great Britain or Ireland*, or before any other legal or competent authority of the like nature." Now this case comes expressly, if not within the words of the act, at least within the intent and meaning of it. An affidavit of this kind made before a Consul, is by this act to be deemed as valid and effectual, for all purposes, as if made before any competent tribunal in this country. This is a case in which this Court has, according to *Omealy v. Newell*, authority to look to the circumstances, and determine whether there is not reasonable ground for holding the party to bail, it appearing from the express words of the statute, that the Consul has power to take an affidavit of this description. Then as to the second objection, it must be understood, by necessary intendment, "that the

words "pounds sterling," mean pounds sterling *English* money, especially in an affidavit made before a *British* Consul. In almost every dictionary and encyclopædia in the *English* language, the meaning of the word "sterling," is said to be "an epithet by which *English* money is discriminated;" "a general name or distinction for the current lawful money in *Great Britain*;" "genuine standard, having passed the test; applied to *English* money," &c. The word "pound" in the *English* language means twenty shillings, and this, when coupled with the word "sterling," removes all ambiguity as to the description of money in which the defendant is indebted to the plaintiff. In *Glossop v. Jacob* (a), the defendant accepted a bill for the payment of 100*l.* sterling, and it being objected that the word *sterling* was omitted in the declaration, Lord *Ellenborough* over-ruled the objection, and that was on a foreign bill, drawn upon a person in this country.

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*Gurney* and *Comyn* contra. Neither of the objections has been answered by the other side. In the first place, no authority has been cited to shew that an affidavit of debt made before a *British* Vice Consul abroad is sufficient to hold a party to bail in this country. The case of *Omeally v. Newell* is no authority for this purpose, because that was the case of an *American* subject arrested in this country, upon an affidavit of debt made at *Paris*, before a magistrate competent in that behalf, and duly authorised by the laws of *France*, to administer oaths and take affidavits. Here there is nothing to shew that a *British* Vice-Consul has any such authority. The statute 6 *Geo.* 4, c. 87, s. 20, does not help the difficulty, because the object of that act was only to place *British* Consuls in foreign ports on the same footing as notaries-public and justices of the peace in *England*, with respect to the power of administering oaths and taking affidavits, in cases in which oaths or affidavits respectively administered and

(a) 1 Stark. N. P. C. 69.

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taken by such functionaries would be of any validity. It does not empower a Consul to take an affidavit for the purpose of holding a party to bail in this country. A debtor cannot be arrested in this country upon an affidavit of debt made before a notary public, or a justice of the peace. The affidavit for such a purpose must be made before one of the judges, or before a commissioner duly appointed for that purpose. The statute in question was passed *alio intuitu*. A Consul is no more than a commercial agent, but the 6 *Geo.* 4, was passed for the purpose of giving him the power of administering oaths and taking affidavits in the same manner as public notaries and justices of the peace are empowered to do in this country. There is nothing in the commission of a *British* Consul which authorises him to take an affidavit of debt, and therefore the affidavit in question is of no validity for the purpose of holding this defendant to bail (a). Secondly, the word "sterling" is too loose and unsatisfactory in an affidavit to hold to bail; affidavits of this description must be construed strictly, especially where the party arrested is a foreigner, and may be wholly unable to procure bail for so large an amount. It does not necessarily follow that the word "sterling" means the current money of *Great Britain*. In some foreign countries, *Denmark*, *Germany*, &c., the word "sterling" is also used as denoting the genuine coin of those realms. The case of *Kearney v. King* (b), is an express authority to shew that the word "sterling" is equally applied to *English* and *Irish* money, though the currency of the two countries is different.

*Cur. adv. vult.*

ABBOTT, C. J., now delivered judgment. The first question is, whether the Court ought to listen to an ap-

(a) See *Vattel's* L. N. lib. 2, c. 2, s. 34, and lib. 4, s. 75, as to the office of consul.

(b) 1 Chit. 28. 2 B. & A. 301. S. C.

plication for the purpose of holding a defendant to bail upon an affidavit made by a foreigner before a *British* Consul resident in a foreign country. Upon that point the judges are equally divided in opinion, and therefore I shall say no more upon it. The other question is, whether the allegation in the affidavit to hold to bail, that the defendant was indebted to the plaintiff in so many pounds *sterling* is sufficiently certain. My three learned brothers are of opinion that the word *sterling* is too uncertain and equivocal in itself to be made the foundation of an order to hold to bail, because in their judgment it is not absolutely certain that the defendant may not be indebted in so much sterling money of *Ireland*. I must own, that upon the best consideration I have been able to give the subject, I have the misfortune not to agree with them upon that point. I yield, however, on this occasion, as I do on all others, with the utmost deference to their joint opinion, and I yield to it the more readily on the present occasion, because the question has arisen on an order made by myself. The result of the opinion of the Court is, that the defendant is entitled to his discharge.

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#### Rule absolute (a).

(a) As to affidavits made abroad, see Tidd, 165, 180, 181. 8th ed. 1 Sellon's Prac. 110, 111, 1st ed. Lee's Dictionary of Practice, 1 vol. Affidavit. 1 Arch. 65, et seq. 2d ed. Viveash v. Becker, 3 M. & S. 284; and Stat. 46 G. 3, c. 19, s. 9.

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## STANILAND v. LUDLAM (a).

If a verdict be found for a defendant in replevin, upon an avowry generally, as landlord, he is entitled to his double costs, under 11 G. 2, c. 19, s. 22, though the replevin be brought solely for the purpose of trying the title to the premises.

Double costs under this statute are estimated by giving the defendant, first, the whole of his single costs, and then half that amount.

**REPLEVIN.** Avowry by defendant generally, as landlord, for half a year's rent due to him in arrear, in respect of the premises on which the effects were seized. The cause came on to be tried at the last assizes for the county of *Nottingham*, when a verdict was found for the *defendant*. By 11 Geo. 2, c. 19, s. 22, reciting, that great difficulties often arise in making avowries or conuzance upon distresses for rent, quit-rents, reliefs, heriots, and other services, it is enacted, "that it shall and may be lawful to and for all defendants in replevin to avow or make conuzance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then and still remains due; or that the place where the distress was taken, was parcel of such certain tenements, held of such honour, lordship, or manor, for which tenements the rent, relief, heriot, or other service distrained for, was at the time of such distress, and still remains due; without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors, owner or owners of such manor. And if the plaintiff or plaintiffs in such action shall become nonsuit, discontinue his, her, or their action, or have judgment given against him, her, or them, the defendant or defendants in such replevin shall recover *double costs of suit*." In taxing the defendant's double costs in this case, the Master, according to the usual practice of his office, first estimated the whole amount of the defendant's single costs, including the expenses of his witnesses, counsels',

(a) This case, and *Charge v. Farhall*, *Reid v. Hollinshead*, and *Pickardo v. Machado*, were decided in the term, but were not inserted in their proper places, the MSS. having been mislaid.

attorney's, and court fees; and then he gave him one half of the sum so ascertained, without any deduction.

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*Denman*, C. S., moved to review the Master's taxation of costs on two grounds, first, that this was not a case within the statute 11 *Geo.* 2, c. 19, s. 22; and second, that at all events the costs had been erroneously calculated. In support of the first ground he produced an affidavit, stating that the action had been brought solely for the purpose of trying the title to the premises in question, each of the parties laying claim to them under the devise of one *Joseph Staniland*, who had made two wills; one in *August*, 1823, and the other in *October*, 1824. The plaintiff claimed under the latter, as devisee, and the defendant under the former. The plaintiff being in possession of part of the devised premises, the defendant distrained for half a year's rent, in order to try the validity of the will under which he claimed, and the plaintiff was therefore obliged to replevy the goods. Under these circumstances, it was submitted not to be a case within the statute, inasmuch as the relation of landlord and tenant did not in fact subsist at the time of the distress, there being no demise, nor any rent in arrear. He cited *Leominster Canal Company v. Cowell* (a), where *Eyre*, C. J., said, "that the distress intended to be protected by the statute 11 *Geo.* 2, c. 19, s. 22, was a distress for a certain rent reserved by a landlord, or his grant or demise theretofore made." Here there was no certain rent due, nor in fact any demise by the defendant to the plaintiff, and consequently it was not a case within the statute. Secondly, assuming it to be a case in which the defendant is entitled to double costs, it was submitted that the Master ought not to have allowed any thing in addition to the single expenses of witnesses, counsels' fees, and court fees.

ABBOTT, C. J.—It must be taken from the result of this

(a) 1 B. & P. 213.



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case at the trial, that the defendant gave some proof that he had a right to avow as landlord; and if so, then he is entitled under the very general words of the statute, to his double costs. As to the mode of estimating the costs, we find from the Master, that the rule he has adopted, has always been acted upon since the passing of the statute, and as we see no reason for disturbing it, nothing can be taken by this motion.

BAYLEY, J., and HOLROYD, J., concurred.

Rule refused (a).

(a) LITTLEDALE, J., was absent.

END OF MICHAELMAS TERM.

**CASES**  
 ARGUED AND DETERMINED  
 IN THE  
**COURT OF KING'S BENCH,**  
 IN  
**HILARY TERM,**

IN THE SIXTH AND SEVENTH YEARS OF THE REIGN OF GEORGE IV.

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MEMORANDUM.

On *Tuesday*, the 31st day of *January*, 1826, the Judges of this Court took possession of the new Court House, in *Westminster Hall*, having since the demise of his late Majesty *George 3*, sat in the *Sessions House* for the city and liberties of *Westminster*.

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DOE, on the joint and several demises of EDWARD RAWLINGS, JOHN TASKER, MARY PINCKE, Widow, SARAH NETTLEFOLD, ABRAHAM NETTLEFOLD, and ROBERT OKILL, v. THOMAS WALKER, JOHN JENNINGS, and RICHARD SURTHERDEN (a).

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**EJECTMENT** for two messuages, and certain lands, situate in the parishes of *Dartford* and *Wilmington*, in the county of *Kent*. At the trial before *Alexander, C. B.*, at the *Kent Lent* assizes, 1824, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case :—

*T. W.*, being seised in fee of certain premises, by lease of 29th September, 1788, demised the same to *J. W.*, for 21 years, at the yearly rent of 60*l.*

(a) The Judges of this Court sat, as on former occasions, at the *Sessions House, Westminster*, under the authority of his Majesty's warrant, issued last term, from *Monday, 9th January*, until *Friday 20th January*, inclusively, when this and the following cases were decided.

*J. W.* entered, and kept possession of the premises, without paying rent, until his death in

1823. By will of 20th *January*, 1799, *T. W.* devised the premises to *J. W.* for life. By lease of 13th *December*, 1799, *T. W.* demised the premises to *J. W.* for 60 years

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*Thomas Williams*, being seised in fee of the premises in question, among others, by his will, bearing date 20th *January* 1799, duly executed and attested to pass real estate, devised as follows:—"Also, I give and devise unto my said nephew, *John Williams*, all those, &c., (describing the premises in question), to hold the same unto and to the use of my said nephew, *John Williams*, and his assigns, for and during the term of his natural life; and from and after his decease, I give the same unto and for the use of *John Williams* and *Thomas Williams*, the two sons of my said nephew *John Williams*, their heirs and assigns for ever, as tenants in common, and not as joint tenants;" but upon this condition, that the said testator's nephew, and his said sons, their heirs and assigns respectively, did, as soon as might be after his decease, take upon him and them the charge of maintaining and supporting for ever, out of the rents and profits of the said hereditaments and premises devised to him and them as aforesaid, the four alms-houses, in *Lowfield*, in *Dartford* aforesaid, and paying to the four dwellers therein, from time to time, 3s. 4d. each, every half year, on *Christmas-day* and *Midsummer-day*, according to the original donation thereof; and the said testator did thereby charge and make liable the said hereditaments and premises so devised to his said nephew and his sons, so far as he could or might, with such maintenance and support, and payment accordingly; and with indemnifying in the most effectual manner, all his other lands and hereditaments, and estates whatsoever, from and against the same for ever.

*December* 13, 1799.—The said *Thomas Williams* by indenture of lease of this date, made between him and his said nephew, *John Williams*, demised to the said *John Williams*, the premises in question, to have and to hold the

from *Michaelmas* 1809, at the yearly rent of 60*l.* By lease and release of 2d and 3d *May* 1806, *J. W.* conveyed his life estate in the premises to *J. P.*, in trust for him, *J. W.*:—Held, that the interest in the premises created in *J. W.* by the lease of *December* 1799, was an *interesse termini* only, and did not merge in the life estate devised to him by the will of *January* 1799.


same unto the said *John Williams*, his executors and administrators, from *Michaelmas-day*, which would be in the year 1809, (when the then present lease of the said premises to the said *John Williams* would expire), for and during the full end and term of 60 years, from thence next ensuing, and fully to be complete and ended, yielding to the lessor, his heirs and assigns, the yearly rent of 60*l*. *John Williams* took down the two houses demised to him by the lease of 1799, and on the scite of them built a new brick messuage, at a considerable expense. At the time of making such lease, the said *John Williams* was in possession of the said premises, by virtue of a lease thereof for a term of 21 years, from *Michaelmas* 1788, which would expire at *Michaelmas* 1809, at the yearly rent of 60*l*. The said testator, *Thomas Williams*, died without revoking or altering his said will, and his nephew, *John Williams*, took possession of the premises devised to him for life, and from that time until his death, as hereinafter mentioned, continued in possession of the said demised premises, without paying any rent under either of the said leases.

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*December* 1805.—*John Williams*, the son of the said *John Williams*, who was nephew of the testator, and one of the devisees in remainder, died intestate, without issue, leaving his brother *Thomas*, his heir at law, him surviving.

*April* 19, 1806.—By indenture of this date, the said *Thomas Williams*, the son, conveyed the reversion in fee of the moiety of his late brother, expectant, and to take possession, upon the decease of the said *John Williams*, the devisee for life, to *Thomas Brandon* and *Thomas Walker*, (now one of the defendants in possession of part of the premises), upon trust, to sell, and pay the debts of his late brother.

*April* 26, 1806.—By indenture of this date, the said *Thomas Williams*, *Thomas Brandon*, and *Thomas Walker*, conveyed the entirety of part of the premises, (being those

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now in the occupation of the defendants *Walker*, and *Surtherden*), to *Edward Rawlings*, (one of the lessors of the plaintiff), his heirs and assigns, for the purpose of paying certain charities, and indemnifying other estates therefrom; and for that purpose, to the use of *John Tasker*, (another lessor of the plaintiff), and his executors, for 2000 years, with remainder, as to one moiety to the use of *Brandon and Walker*, in fee, upon the trusts of the deed of 19th April preceding; and as to the other moiety, to the use of the said *Thomas Williams*, in fee.

*May 2, 1806.*—By indenture of this date, made between the said *John Williams*, (the father), of the one part, and *James Parker*, of the other part, it was witnessed, that the said *John Williams*, in consideration of 5s., to him paid by the said *James Parker*, did bargain and sell unto the said *James Parker*, his executors, &c., the premises in question; and also all the lands and hereditaments let with the said premises, by *Thomas Williams*, then lately deceased, to the said *John Williams*, by indenture dated *December 13, 1799*, for the term of 60 years, commencing from *Michaelmas 1809*; and also all and singular ways, &c., and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, at the rent of a peppercorn, to the intent, that by virtue thereof, and by force of the statute, &c., the said *James Parker* might be in actual possession of the said premises, and might be thereby enabled to accept and take a grant and release of the freehold thereof, to him and his heirs, to the use of him the said *James Parker*, his heirs and assigns for ever.

*May 3, 1806.*—By indenture of this date, made between the said *John Williams* of the one part, and the said *James Parker* of the other part, it was witnessed, that in consideration of 10s. to the said *John Williams* paid by the said *James Parker*, the said *John Williams* did grant, bargain, and sell unto the said *James Parker*, in his actual possession, (referring to the last-mentioned deed), and his

heirs, all that freehold, or life estate of the said *John Williams*, of and in all those two messuages, &c., (following the description in the preceding deed), and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, and interest of the said *John Williams* therein and thereto; to hold the said messuages, &c., with the appurtenances, unto the use of the said *James Parker*, his heirs and assigns, for and during the natural life of the said *John Williams*; in trust, nevertheless, for the said *John Williams*, his heirs, executors, and assigns, to be conveyed and disposed of as the said *John Williams*, his heirs or assigns, should direct or appoint.

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*July 8 and 9, 1806.*—By indentures of lease and release of these dates, respectively, the said *Thomas Brandon* and *Thomas Walker* conveyed, and the said *Thomas Williams* conveyed and confirmed the reversion or remainder of one moiety; and the said *Thomas Williams* also conveyed the reversion or remainder of the other moiety of part of the premises, (being that part now occupied by the defendants *Walker* and *Surtherden*, and included in the indemnity deed of 26th April, 1806), to *John Hill*, in fee.

*October 24 and 25, 1806.*—By indenture of lease and release of these dates respectively, the said *Thomas Brandon* and *Thomas Walker*, and *Thomas Williams*, conveyed, in like manner, the reversion of the other part of the premises, (being that part now in the occupation of the defendant *Jennings*), to *John Hill*, in fee.

In which several conveyances is contained an exception in the covenant against incumbrances of the then subsisting lease to *John Williams*, bearing date in the year 1788, granted by the said *Thomas Williams*, for the term of 21 years, from *Michaelmas* 1788; and of an indenture, bearing date the       day of       , 1799, granted by the said *Thomas Williams*, deceased, for the term of 60 years, to commence at *Michaelmas*, 1809, at the yearly rent of 60*l*.

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The exception was (inter alia) in the words following :—  
“ except an indenture of lease of the aforesaid premises (with the said other hereditaments) purchased by the said *John Hill*, comprised in said lot 3 of said sale, granted to said *John Williams*, the father, which would expire at *Michaelmas* 1809, at the yearly rent of 60*l.*; and also, except another indenture of lease, bearing date the day of       , 1799, granted by said *Thomas Williams*, deceased, to said *John Williams*, of said thereby granted premises, with the other hereditaments comprised in said lot 3, for the term of 60 years, commencing at *Michaelmas* 1809, at the like yearly rent of 60*l.*”

*December 27th*, 1815.—The said *John Hill*, by his will, bearing this date, and duly executed, devised to his grand-daughter, *Sarah Nettlefold*, (another lessor of the plaintiff), the reversion in question at her age of twelve years, to hold during her life; and directed the rents and profits in the meantime to be applied for her maintenance, (without saying by whom), with remainder to the said *Nettlefold* and *Okill*, (two other lessors of the plaintiff), upon trust, to sell, and apply the produce as therein mentioned; and after other devises and bequests, he devised and bequeathed all and every other his messuages or tenements, cottages, gardens, lands, and hereditaments, with their appurtenances, situate in *Wilmington* and *Stone*, in the county of *Kent*, and his sixth part or share of *Dove Farm*, at *Dorking*, or elsewhere, not hereinbefore given and devised, and all other his real and personal estates, whatsoever and wheresoever, and of what nature, kind, or quality soever, which he had a right and power to dispose of, to said *Abraham Nettlefold*, (another lessor of the plaintiff, in a separate demise), his heirs, executors, administrators, and assigns, for ever.

*August 14th*, 1823.—The said *John Williams*, the tenant for life, died, whereupon the lessors of the plaintiff claimed the possession of the premises in question, as deriving title to the same from the said *Thomas Williams*, the surviving

remainder-man in fee, and on the ground that the said term of 60 years was no longer subsisting.

*September 20, 1768.*—That part of the premises in question, in the occupation of the said *John Jennings*, was duly assigned to *John Tasker*, for the residue of another legal and subsisting term of 1000 years, legally created by a valid mortgage deed, dated 24th *March, 1767*. *John Tasker*, by his will, appointed *Thomas Williams* and *Anne* his wife, his executors. *Anne* survived her husband, the said *Thomas Williams*, and by her will appointed *Mary Pincke*, (one of the lessors of the plaintiff), her executrix; and *Anne* died before 1st *September* last.

The question for the opinion of the Court is, whether the said term of 60 years granted by the indenture of lease, of 13th *December, 1799*, in reversion, after the expiration of the previous existing lease, made by *Thomas Williams*, to his nephew *John Williams*, is still subsisting, or merged in the freehold for life, devised by the said *Thomas Williams* to the said *John Williams*.

*Chitty*, for the lessors of the plaintiff. The term created by the lease of *December 1799*, from *Thomas Williams* to *John Williams*, or rather, the *interesse termini*, for it was no more, arising out of it, merged in the life estate then possessed by *John Williams*, under the will of *Thomas Williams*, dated *January 1799*. At the time when the lease of *December 1799*, was granted, *John Williams* was tenant for 21 years, under the prior lease of *Michaelmas 1788*, as well as tenant for life under the will. He kept possession of the premises, without ever paying any rent for them, down to the time of his death, in *August 1823*; and in the course of his occupation he built a house upon the estate, which was an act perfectly inconsistent with the idea of his being merely tenant for years. [*Bayley, J.* It was equally inconsistent with the idea of his being tenant for life]. The lease and release of *May 1806*, from *John Williams* to *James Parker*, conveyed all the

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lands, &c., reversions and remainders, and all the estates right, title, and interest of *John Williams*, therein and thereto, without any exception whatever; the interesse termini, therefore, passed by that deed, for the words "therein and thereto," are large enough to comprehend every kind of interest which *John Williams* had. [*Holroyd, J.* I doubt that: there are no words expressly assigning the lease, and I am not sure whether the words "therein and thereto," do not apply rather to the freehold or life estate, and reversion, than to all the estate he had in the premises]. The word "interest" is large enough to pass the lease; *Preston on Conveyancing*, iii. 124; and the word "reversion," is not an adequate description of the interest he had in the premises: the words "reversion and remainder," are not referable to the last antecedent, "estate for life." The lease for a year recognises *the pre-existing lease*, and under that expression the interesse termini would pass. [*Bayley, J.* The deed does not contain a single word expressive of an intention to pass the pre-existing lease]. Perhaps not, but the interesse termini will pass nevertheless, and if so, that was equivalent to possession under the lease. *Salmon v. Swann (a)*, is an authority in point. There the king seised in fee, demised to the Earl of *Northumberland* for 100 years, if the wife of Lord *Cobham* should so long live, to begin after the death of Lord *Cobham*; and afterwards, in the same year, granted the land in fee, to *Charles Brook*, who, before the death of Lord *Cobham*, made a lease for 21 years to *Page*. The Earl of *Northumberland*, also before the death of Lord *Cobham*, granted his term to *Brook*; who afterwards granted a rent-charge to Sir *Thomas Trevor*, during the life of Lady *Cobham*, for which the grantor, after the death of Lord *Cobham*, distrained upon the lessee. The question was, whether the lease for 100 years, was in esse in *Brook*, who had the inheritance when he granted the rent-charge; or, whether it was

(a) Cro. Jac., 619.


merged in the inheritance. The Court held that it was merged in the inheritance. [*Bayley, J.* The lease was in *Brook's* possession immediately upon the death of Lord *Cobham*, which happened before the distress was made; and *then* merged: whether it merged *before* the death of Lord *Cobham*, does not appear. The term of 100 years there, was paramount to that of 21 years, and was granted by a person having a superior title]. *Colburne v. Mixstone (a)*, is still more in point. [*Bayley, J.* I do not apprehend that was the case of a lease to commence in futuro]. There were two leases. The first was to *A.* for 21 years, if she should so long live; the second was to *B.* for 21 years: and lastly, there was a devise to *B.* for life; and it was held, that the second lease had merged. It must be admitted that the second lease appears, from the language of the reporter, to have been a lease in reversion; but the question is, from what period it was to run: for if it was to run from the expiration of the first lease, it came into possession, and merged. So here, the lease was to commence in possession in 1809, and merged by the devise of the freehold in the mean time. The union of two estates in one person at one time, is the union of interest, not of possession; the interest is that which the law regards here, as it would with reference to its passing in cases of bankruptcy, or execution. If the termor in futuro, in this case, had levied a fine of the *interesse termini*, he would have forfeited his estate. It is inconsistent that he should set up as against his freehold, a term which can be remedied only in equity. If he could not take the *interesse termini* by surrender, at least he might by assignment; and the words of the deed of *May* 1806, and the fact that he never paid rent, are strong to shew that he did so.

*Bolland, contra.* There was no merger of the term

(a) 1 Leon. 129, Viner. tit. Merger, I. pl.9. Preston on Conveyancing, iii. 124.

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of 60 years. There was no such blending of interests or estates in the termor, as is necessary to create a merger. The interest of *John Williams*, in the lease of *December 1799*, was a mere *interesse termini*; he had no term: he had only a right to a term at a future time by entry. *Littleton*, speaking of tenant for years, s. 58, says, "when the lessee entereth *by force of the lease*, then is he tenant for term of years;" upon which, Lord Coke adds, "and true it is, that for many purposes he is not tenant for years, until he enter.—But the lessee, before entry, hath an interest, *interesse termini*, grantable to another (a). An *interesse termini* is not affected by ouster; such a right, not being an estate, does not prevent, or cause a merger; *Hanning v. Brabason* (b), *Whitchurch v. Whitchurch* (c). An *interesse termini* cannot be surrendered; nor, before the entry of the lessee, can it be the foundation of a release by the lessor, to enlarge the estate; Co. Litt. 46 b. *Shep. Touch.* 324; *Barker v. Keat* (d). For the lessee, to whom the release is made, must have possession of the land at the time it is made, and not merely a right to have the land by force of the lease; *Saffyer's case* (e). An *interesse termini* is not affected by any tortious act, as abatement, intrusion, or disseisin; *Bruerton v. Reinsford* (f), *Wheeler v. Thorowgood* (g), *Wyngate v. Marke* (h). Then, as an *interesse termini* cannot be surrendered, neither can it be merged, for merger is a surrender in law, working the same effect as a surrender in fact; *Shep. Touch.*, 304, 324; and in order to operate as a merger, there must be a possession: and then, if this estate was not merged, neither was it extinguished, for extinguishment is the consequence of the union in one and the same person of two several and inconsistent estates, and *quando duo jura in unâ personâ concurrunt, sequum est ac si essent in diversis*. Co. Litt., 147 b, 149 a, b,

(a) Co. Litt. 46 b.

(c) 2 P. Wms. 236.

(e) 5 Rep. 124.

(g) Id. 127.

(b) Bridgman, 7.

(d) 2 Mod. 249.

(f) Cro. Eliz. 15.

(h) Id. 275.

*Viner*, tit. *Extinguishment*, A. pl. 18, 19, C. pl. 14, 33, 83. Here, there is no such union of estates, nor is there any inconsistency, for no relation of landlord and tenant exists in this case. The decision in *Salmon v. Swann* (a), does not in the least affect this case. There the purchaser of the *interesse termini* was the owner of the fee, and the thing done was the act of the party himself; here, there is no act done by the party himself; the freehold is devised to the lessee, and his acceptance of that devise extinguishes the *interesse termini* only so far as it is inconsistent with the life estate. *Colburne v. Mixstone* (b), therefore, is the only case upon which the lessors of the plaintiff can rely, and that is a solitary decision, not only unsupported, but directly contradicted by all the other authorities upon the subject. Besides, that case is evidently mis-reported, for upon referring to the roll, it will be found that there were two concurrent leases there, which distinguishes it entirely from the present, and renders the doctrine there laid down wholly inapplicable here.

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*Chitty*, in reply. The point to be regarded in a court of law, is, the vesting the interest, and not the right of possession. Now here, the interest in the lease was extinguished by the vesting of the interest in the life estate, and therefore, whether, as an *interesse termini*, the lease could or could not be merged, or surrendered, or extinguished, makes no difference.

The case was argued at the Sittings after last *Trinity* term, when the Court took time for consideration. Judgment was now delivered by

BAYLEY, J.—The question stated for the opinion of the

(a) Cro. Jac. 619.

(b) 1 Leon. 129. *Viner*, tit. *Merger*, I. pl. 9. *Preston on Conveyancing*, iii. 124.

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Court in this case is, whether the term of 60 years was merged in the life estate. It was an action of ejectment, and the single question presented to our consideration on the argument was, whether a term for years, created in *December 1799*, to commence at *Michaelmas 1809*, was annihilated by, and merged in, the life estate devised to the lessee in *January 1799*; that life estate having been conveyed away by the lessee before *Michaelmas 1809*, so as to prevent him from having that and the leasehold estates, by way of present interest, at one and the same time, but not preventing him from having at one period of time, both estates in the character of lessee.

The facts as to this point are very short. In *January 1799*, *Thomas Williams*, who was owner of the fee, made his will, by which he devised to *John Williams*, for life, the premises, all at that time under lease to *John Williams*, for a term which would expire at *Michaelmas 1809*. Before the testator died, namely, in *December 1799*, he made a further lease to *John Williams* for 60 years, from *Michaelmas 1809*. The testator died in *December 1800*. By deeds of lease and release of *May 1806*, *John Williams* conveyed his life estate to *James Parker*, to the use of *James Parker*, his heirs and assigns, for the life of *John Williams*, but in trust for *John Williams*; so that the deed of *May 1806*, vested the legal interest in the life estate of *John Williams* in *James Parker*, and took it entirely out of *John Williams*. *John Williams*, therefore, had the legal estate for his own life from *December 1800*, till *May 1806*; when he conveyed it away. His interest then was under the lease of *December 1799*. That gave him no right of possession, nor what can properly be called an estate, during any part of the time that he himself had the legal estate for his own life; it gave him only a species of what the law calls an *interesse termini*, a right to have the possession at a future time, namely, at *Michaelmas 1809*: and when the nature of an *interesse termini*, and the prin-

ciples upon which the doctrine of merger is founded, are considered, there is no difficulty in coming to the conclusion that there was no merger in this case.

There are two descriptions of what the law calls an *interesse termini*:—a right, under a lease, to commence *in præsenti*; which, as the lease is not called into operation by the common law until entry, is an *interesse termini* only; and a right, under a lease, to commence *in futuro*, which until that future period arrives, is also an *interesse termini* only; and the rules which are applicable to either description of *interesse termini*, are equally applicable to both. Each is a *right* only; not an *estate*. The estate is in the lessor; and in neither case will a conveyance by the lessee to the lessor operate as a surrender; nor will a release from the lessor to the lessee operate by way of enlargement. It will not operate by way of enlargement, because the person to whom the release is made, must have an interest in himself, upon which the enlargement may operate. There can be no enlargement, where the person in whose favour the instrument is made, has nothing to be enlarged. The right may be granted away, as a right; or it may be extinguished by a release, or by any other instrument calculated to extinguish it; but it cannot be conveyed as an estate; and though the release may extinguish it, it has the properties of a right, and not of an estate.

In *Co. Litt.* 46 *b*, a rule is laid down with reference to a lease in *præsenti* at common law. He says, "True it is, that to many purposes he is not tenant for years until he enter; as a release made to him is not good to him to increase his estate before entry; but he may release the rent reserved before entry, in respect of the priority. Neither can the lessor grant away the reversion, by the name of the reversion, before entry." The reason of that is, because, before entry, no part of the estate is in the lessee, but the whole estate is in the lessor; and therefore to describe the whole estate as a reversion, when in fact there

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is no particular estate vested in any other person, is an erroneous mode of expression. He adds, "But the lessee, before entry, hath an interest, *interesse termini*, grantable to another; and albeit the lessor die before the lessee enters, yet the lessee may enter into the lands, as our author himself holdeth in this chapter." So *Litt. s.* 459, says, "Also, if a man letteth to another his land for a term of years, if the lessor release to the lessee all his right, &c., before that the lessee had entered into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease. But if the lessee enter into the land, and have possession of it by force of the said lease, then such release made to him by the feoffor, or by his heir, is sufficient to him, by reason of the privity which by force of the lease is between them." Lord Coke's comment upon this is:—"For before entry the lessee hath but *interesse termini*, an interest of a term, and no possession, and therefore a release, which enures by way of enlarging an estate, cannot work without a possession, for before possession there is no reversion; and yet if a tenant for twenty years in possession make a lease to *B.* for five years, and *B.* enter, a release to the first lessee is good, for he hath an actual possession, and the possession of the lessee is his possession. And so it is if a man make a lease for years, the remainder for years, and the first lessee doth enter, a release to him in the remainder for years is good, to enlarge his estate. But if a man make a lease for years, to begin presently, reserving a rent, if before the lessee doth enter the lessor releaseth all the right that he hath in the land, albeit this release cannot enlarge his estate, yet it shall in respect of the privity extinguish the rent. And so it is if a release be made to begin at *Michaelmas*, reserving a rent, and before the day the lessor release all the right he hath in the land, this cannot enure to enlarge the estate, but to extinguish

the rent in respect of the privity." Lord Coke again mentions the subject in *Co. Litt.* 337 *b*, where he takes the distinction between a surrender in law, and a surrender in fact. He says, "Surrender, sursum redditio, properly, is a yielding up of an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them." And he afterwards adds, "It is to be noted, that a surrender in law is in some cases of greater force than a surrender in deed. As, if a man make a lease for years, to begin at *Michaelmas* next, this future interest cannot be surrendered, because there is no reversion wherein it may drown; but by a surrender in law it may be drowned. As, if the lessee before *Michaelmas* take a new lease for years, either to begin presently or at *Michaelmas*, this is a surrender in law of the former lease;" that is, by an intermediate lease becoming a surrender of the former interest which the party had in him. A declaration to the same effect, and a recognition of the same rule, will be found in a judgment of Lord Chief Justice *Bridgman*, in page 7 of his Reports, where he states that an *interesse termini* is to begin at a future period, and therefore cannot be surrendered: and the same doctrine is laid down in *Sheppard's Touchstone*, 324, and in 4 *Cruise's Digest*, 94, 98 (a).

Now the result of these authorities is to shew that an *interesse termini*, whether of the one or of the other description I have mentioned, does not vest the estate in the person to whom the estate belongs: he has no part of the estate in him by means of the *interesse termini*; but he has a right, and a right only: and the consequence is, that those results and those properties which are applicable to estates, are not applicable to the interest which he has, but those results and those properties which are applicable to a right only. Now the principle of merger is, that there are two inconsistent estates in one and the same person,

(a) Et vide *Tamlyn* on terms of years, cap. iii. passim.

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at one and the same time; one of which is swallowed up by the other. Mr. Justice *Blackstone*, in 2 *Comm.* 177, thus defines it. "Whenever a greater estate and a less estate coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be merged, that is, sunk or drowned, in the greater. Thus, if there be tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more." To constitute a merger, then, there must be the union of two estates; but here there is no such union: for the *interesse termini* does not confer the right to the estate, until the legal interest in the life estate has passed away. Instead of the two estates being in *John Williams* at the same time, he never had more than one estate. He had no estate but the estate for life, until *Michaelmas* 1809; and after that period he had nothing in him but the term created in 1799. Then where is the inconsistency or incompatibility which is requisite to constitute a merger? In order to bring the case within the doctrine of merger, there must be a tenancy for years, with an immediate reversion to himself for years, for life, or in fee; and there would be an inconsistency and incompatibility in filling both those characters; for in the character of reversioner he would be the person to call upon himself for this reversion, whether in fee, or for life; in respect of waste, it would be to himself that he would have to answer; and he would have to perform the services due to himself as tenant. As reversioner, even for years, he would be apt to neglect those duties, to protect himself from acts of forfeiture committed by him as tenant; and it was to prevent these and other similar inconveniences that the Statute of Merger was founded. But what is the inconsistency, or what the inconvenience, of one person filling, not two concurrent, but two successive characters? If a tenant for years acquire a life interest in the estate, the two inte-

rests become concurrent, and one only can exist. But why might not an estate pour autre vie, &c., be granted to him? He would in that case, as grantee of the estate, be tenant for life, and would be amenable to the reversioner for every duty to which such a tenancy is subject: but he would never stand in the character which it is the object of the law to prevent; he would never be reversioner to himself.

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There were two cases cited by Mr. *Chitty*, in the argument, and relied on in behalf of the lessors of the plaintiff, which it is desirable we should notice, for the purpose of pointing out the distinction between those cases and the present. Those cases were *Salmon v. Swann*, and *Colbourne v. Mixstone*. *Salmon v. Swann* will be found, as it appears to me, to be the case not of the merger of an estate, but of the extinguishment of a right; and though *Colbourne v. Mixstone*, as reported in *Leonard*, seems as if it were the case of an *interesse termini*, to commence after the expiration of the term created by two former leases, yet upon referring to the roll, (for which we are under obligation to Mr. *Bolland*, as it has removed the difficulties which the case would otherwise have presented), it turns out, instead of being the case of an *interesse termini*, of a term to commence in future, to have been the case of a concurrent term, which was in existence at the same period when the life estate was in existence also; so that the same person had at one and the same time in himself, not merely a life estate and an *interesse termini* to commence at some future period, but a life estate and a leasehold estate concurrent; and therefore the doctrine of merger was strictly applicable to that case.


The case of *Salmon v. Swann* may be more fully stated thus:—*Brook* was the owner of the fee, subject to an *interesse termini* for 100 years, to commence on the death of Lord *Cobham*; and *Brook*, being owner of the fee, made a lease for 21 years. Probably that lease contained the ordinary terms of demise, and empowered him to

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secure to the tenant the interest which the lease professed to grant. That lease was liable to be defeated, by the existence of the *interesse termini*, whenever Lord *Cobham* died, because then the *interesse termini* would be converted from a mere right into a life estate. After having made the lease for 21 years, *Brook* took a grant of the *interesse termini*. Then, that either became a continuing right in himself, or he took it for the purpose of extinguishing it, and preventing its operating in prejudice of the lease which he had granted. He afterwards granted a rent charge, and the question was, whether the distress that had been made for the arrears of that rent, which accrued after Lord *Cobham's* death, should prevail, and so avoid the lease for 21 years. If the term for 100 years was a subsisting term, then, the distress could not prevail against the lease for 21 years; because that term would supersede and be paramount to the term for 21 years; but if that term were to be considered as not subsisting, it would be otherwise, for then, the term for 21 years would be paramount, and would prevail against the rent charge. It was resolved that the term for 100 years was drowned in the inheritance; for notwithstanding the lease for 21 years, it was not so severed from the reversion; for by a grant thereof to him who had the inheritance, the future term was drowned. But, was that by way of merger of the estate by an union of two estates; or, was it not by way of extinguishment of the right? The transaction was rather in the nature of a grant, than of a merger; for it was passing the *interesse termini* to the owner of the inheritance; it was not a grant of the inheritance to the owner of the *interesse termini*, for there can be no grant of an *interesse termini* to the reversioner: and where is there any instance of a merger, where there can be no grant? I know of none. The principle upon which I understand that case to have been decided, is this; that the grant to *Brook* operated, not to keep alive the *interesse termini*, but to destroy it, as it could not have been sup-

posed to be obtained by him to regain the estate on Lord *Cobham's* death, and to defeat his own lease for 21 years; but must have been supposed to be obtained by him to support his own lease; in short, for honest purposes, to protect himself, and not for dishonest purposes. That, therefore, in my opinion, is not to be regarded as a merger of an *interesse termini*, but as a mere extinguishment of a right, by granting that right to the owner of the inheritance; and therefore the grant would operate as a release, its effect being not to merge the estate, but to extinguish the right.

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Then with respect to *Colbourne v. Mirstone*. That is described as having been the case of a lease in reversion, expectant upon the expiration of a prior lease; but upon the roll it appears not to have been the case of a lease in reversion to commence in futuro, but of a lease in reversion to commence in præsentî. The question was, whether an executor had been guilty of misconduct in the spiritual court, in omitting to describe in an inventory in that court, a lease which his testatrix, *Alice Leigh*, had. If that had been a subsisting lease in *Alice Leigh's* lifetime, he had been guilty of misconduct. The case is described as applying to two houses. According to the report in *Leonard*, the houses were both leased to different persons, and the lease to *Alice Leigh* was in reversion for 21 years. The argument did not proceed in any degree upon the distinction between an *interesse termini* and an existing and subsisting term; but the only question which appears to have been discussed was, whether there had been such an acceptance of the life estate by *Alice Leigh*, as, supposing the thing to be properly the subject of merger, would merge the leasehold estate in the life estate. Upon referring to the record, I find the facts of the case to have been these:—*Henry Leigh*, the testator, had four houses; the *Marygold* was one, upon which no question arose; he demised the three other houses to three different persons, one of whom was named *Chippendale*. The rents upon

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two of the houses were 3*l.* 6*s.* 8*d.*, and 5*l.*, making 8*l.* 6*s.* 8*d.* and *Chippendale's* was 2*l.* Within a year after the lease to *Chippendale*, he granted to *Alice Leigh* the lease of the house which had been previously granted to *Chippendale*; and that lease appears, from the report, to have been conceived in different terms from those in which another lease of the two houses, afterwards granted by him, was conceived. He demised the reversion of that house, when it should happen, to *Alice Leigh*, for 21 years, which was the term stated, at 2*l.* a year rent. Then, as to that house, it was a lease of the reversion, when it should happen; but as to the two other houses, he demised them, and the *Marygold*, to *Alice Leigh*, from thenceforth for 21 years, paying yearly 9*l.* 6*s.* 8*d.* rent, which was exactly the sum with the addition of the *Marygold*, and there was an addition of 1*l.* a year rent beyond the sums which had been reserved upon the leases of the two other persons. Now that would be an interest created by that lease in her, not to commence when the pre-existing leases should expire, but to commence in præsentî; and would make her, for the term of 21 years, the immediate reversioner of those leases, and would entitle her to receive from those lessees the rents which they would have to pay. After that, the testator devises his lands and houses to *Alice Leigh*, for the better education of her children. Upon his death, she entered into the *Marygold*, and therein, and (upon the reversion) of the three houses, was possessed for life, and received the rents reserved upon the three houses. So that *Alice Leigh's* term in two of the houses was a subsisting term at the time she took the life estate; and if the term in those two houses had subsisted, and had not merged, she would at the same time have been possessed of the reversion of those two houses for her term of 21 years, and also would have been seised of the freehold estate. The case, therefore, as to those two houses, was a case, not of an interesse termini, as the report in *Leonard* describes it, but of a subsisting term, and therefore, *Alice Leigh* had

in herself, at one and the same time, two distinct estates. It seems to us, therefore, that those two cases conclude nothing in favour of the lessors of the plaintiff in this case; and upon the grounds which I have already mentioned, we are of opinion, that there was no merger in this case, and that our judgment must be for the defendants, as to that part of the property to which the only question raised for our consideration applies. With respect to the other parts of the property, we are not now called upon to give any opinion, and therefore abstain from so doing.

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Judgment for the defendants.

STYLES v. WARDLE (a).

**COVENANT.** The declaration stated, that by indenture made between plaintiff and defendant, *dated 24th December, 1822*, defendant, in consideration of 944*l.* to him paid, and certain covenants of plaintiff by him to be performed, demised to plaintiff certain premises for 97 years, subject to an agreement for an underlease to *A. B.*, for 21 years;—that defendant covenanted that he would, within 24 calendar months next after the date of the indenture, cause and procure *A. B.*, at his own expense, to accept a lease of the premises for 21 years, from *Christmas-day, 1821*, and to execute and deliver a counterpart thereof; and that in case *A. B.* would not accept the lease, defendant would, within one calendar month next after the end of the said 24 calendar months, repay to plaintiff, for his own absolute use, 72*l.* 16*s.* 4*d.*;—Breach, that defendant did not, within 24 calendar months after the date of the indenture, which 24 calendar months had long since elapsed, cause or procure *A. B.* to accept, nor did, nor would *A. B.* accept, a lease of the premises for 21 years, from *Christmas-day, 1821*, nor did, nor would defendant

Where a deed has no date, or an impossible date, *date* in other parts of the deed means *delivery*; but where it has a sensible date, *date* of the deed means the day of the date, and not the day of the delivery.

(a) This case ought to have been published in the last part, but the manuscript had been mislaid.

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cause or procure *A. B.* to execute and deliver a counterpart thereof; and although, by means of the premises, and according to the indenture, defendant became liable to repay to plaintiff within one calendar month next after the end of the said 24 calendar months, 72*l.* 16*s.* 4*d.*, yet defendant did not repay the same, although the said one calendar month had long since elapsed. Plea, that the indenture was, in fact, executed and delivered long after the time on which it bears date, to wit, on 8th *April*, 1823; and that at the time of plaintiff exhibiting his bill against defendant, 25 calendar months had not elapsed from the execution of the indenture. Demurrer to the plea, and joinder in demurrer.

*Chitty*, in support of the demurrer, was stopped by the Court.

*Dodd*, in support of the plea. The only question in this case is, whether the period within which *A. B.* was to accept the underlease, is to be calculated from the date of the lease, or from the execution and delivery of it. Now that period must clearly be calculated from the delivery; for the date is the delivery. Mr Justice *Blackstone*, in his description of a deed, says, "Lastly, comes the conclusion, which mentions the execution and date of the deed, or the time of its being given, or executed, either expressly or by reference to some day and year before mentioned. Not but a deed is good, although it mention no date; or hath a false date; or even if it hath an impossible date, as the 30th of *February*; provided the real day of its being dated, or given, that is delivered, can be proved (*a*)."  
 In support of this doctrine, the learned commentator cites Co. Litt. 46 b, in notes 8 and 9, to which the following cases are put:—" *A.*, on the 2d of *August*, 1 Jam., makes an obligation to *B.*, and afterwards, on the same day, *B.* releases all actions usque datum scripti; the obligation is

(*a*) 2 Bl. Comm. 304.

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discharged, because *date is delivery*." " Lease by indenture of 25th of *March*, 13 Car., to have and to hold from and after the day of the date of these presents, for the term and time of seven years from henceforth next and immediately ensuing, shall commence *in computation from the delivery*, and in point of interest from the date." Again, in *Pugh v. The Duke of Leeds* (a), Lord Mansfield, after reviewing all the authorities upon the subject, uses the following expressions:—" The date is a memorandum of the day when the deed was delivered: in Latin it is datum; and datum tali die, is delivered on such a day." " What is the day of the date? It is the day the deed is delivered." In *Steele v. Mart* (b), Holroyd, J., says, " I apprehend it to be perfectly clear, that a party may shew that the deed was delivered on a different day from that on which it bears date. For this *Oshey v. Sir Patrick Hicks* (c), is a direct authority:" and *Hall v. Cazenove* (d) is another authority to the same point, where Lord Ellenborough said, " A deed can only be said to be concluded when it is delivered. The time of delivery is the important time when it takes effect as a deed; and the case of *Stone v. Bale* (e), is in point to shew that the delivery may be averred to be after the date." Besides, in this case, it may fairly be presumed to have been the intention of the parties that the computation should be made from the delivery; for the defendant covenants to procure A. B. to accept the under lease within 24 months *then next after the date*; and the words " then next," must refer to the time when the deed was executed. Now, if the deed had not been executed till more than 24 months after the date, it would have been impossible to say that the defendant was immediately upon the execution liable to an action for a breach of covenant; and yet that must be the result if the 24 months are to be computed from the date, and not from the delivery.

(a) Cowper, 714.

(b) Ante, vol. vi. 399. 4 B. &amp; C. 272, S. C.

(c) Cro. Jac. 263.

(d) 4 East, 477.

(e) 3 Lev. 348.



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BAYLEY, J.—This is simply a question of the construction of a deed. A deed is not perfect, and has no operation, as such, until it is delivered; and there certainly have been cases, in which, *ut res valeat*, it has been held necessary to construe the word *date* as *delivery*. I take the proper rule to be this: where there is no date, or an impossible date, date means delivery; but where there is a sensible date, date in other parts of the deed, means the day of the date, and not the day of the delivery. For this distinction, Lord Coke is my authority. In the page already referred to, he says, “If a lease be made by indenture, bearing date 26th *May*, to have and to hold for 21 years, from the date, or from the day of the date, it shall begin on the 27th day of *May*. If the lease bear date the 26th day of *May*, to have and to hold from the making hereof, or from henceforth, it shall begin on the day on which it is delivered.” And again, “If an indenture of lease bear date which is void or impossible, as the 30th day of *February*, if in this case the term be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all.” It has been held with respect to an award, that where it is awarded that a particular thing shall be done within a certain time after the date of the award, and it has no date, the day of delivery must be adopted in its place; *Armit v. Breame* (a), where the Court said, “If the award has no date, it must be computed from the delivery, and that is one sense of *datus*.” Then, what is the meaning of *datus* in this covenant, for that is the real question in the case? I think the party who executes a deed, must be taken as meaning and consenting that, for the purposes of computation, the day mentioned in the deed shall be considered as the date of the deed; and a different rule of construing the word *date* would lead to very mischievous consequences: for, suppose a lease executed on the 31st of *March*, to hold from the date thereof, being the 25th, and the tenant enters and

(a) 2 Ld. Raymond, 1076.

holds from the 25th, when the lease had expired he might answer an action of ejectment by saying, that the lease was executed on a day subsequent to the 25th, and that he did not hold from that day. Looking through all the authorities on this subject, we find that, generally speaking, the word *date* has an express and definite meaning, but that its meaning may vary, when such a result is necessary to give effect to the deed. It may be true that the computation could not have been intended to begin from the date, if the 24 months should have expired before the execution, because in that case the intention of the parties would have been clear and indubitable, that the computation should begin from the execution. It seems to me, that the meaning of this deed is perfectly plain; that adopting that meaning, a breach of covenant was committed before the action was commenced; and, consequently, that this plea is bad, and the plaintiff is entitled to judgment upon the demurrer.

HOLROYD, J., concurred.

LITLEDALE, J., was absent on the winter circuit.

Judgment for the plaintiff.

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UPON shewing cause against a rule for setting aside the judgment in this case for irregularity; the facts were these. The defendant, whose *Christian* name was *Edmund*, and also was sued as *Edmund*, delivered a plea commencing "And the said *Edward*." The plaintiff treated this as a nullity, and signed judgment as for want of a plea. The question was, whether the judgment was regular or not.

Per CURIAM.—The plaintiff was not entitled to treat

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A mis-statement of defendant's *Christian* name, in the commencement of his plea, does not entitle plaintiff to treat it as a nullity, and to sign judgment as for want of a plea.

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this plea as a nullity, and therefore the judgment is irregular. The plea evidently referred to the declaration, and plainly intended to point out the person mentioned as the defendant in that declaration. There was no such person as *Edward* upon the face of the proceedings, and the word was clearly a mere clerical error, and meant *Edmund*. If the plaintiff chose to take advantage of such an error, he should have done it in the proper mode, by special demurrer: but it would be too much to allow him to obtain a judgment by such a course as this.

Rule absolute.

*Abraham*, for the plaintiff. *Reader*, for the defendant.

## PEARCE v. WHALE.

A certificate is, *primâ facie*, evidence of the legal right of an attorney to practice. Where an attorney was admitted in K. B., in 1792, took out his certificate, and practised regularly till 1814; then discontinued his certificate till 1819, when he again took it out regularly, and practised in C. P.:—Held, in an action by him in K. B., for the costs of defending a suit in C. P., that the production of his certificate was *primâ facie* evidence of his having been re-admitted in *some* Court, and that it lay on the defendant, in answer to the action, to prove that he had *not* been re-admitted in *any* Court.

**A**SSUMPSIT for work and labour done by the plaintiff, for the defendant, *as an attorney*. There were also counts for work and labour *generally*, and the money counts. Plea, non assumpsit. At the trial before *Graham*, B., at the last *Lent* assizes for the county of *Essex*, it appeared that in *Easter* term, 1824, the plaintiff was employed by the defendant as his attorney, to defend an action brought against him in the court of *Common Pleas* by one *Bousfield*; that he did accordingly defend that action, his charges for which, amounted to 34*l.* 8*s.* 4*d.*, of which sum 17*l.* 10*s.* 1*d.* was for money actually disbursed by the plaintiff on account of the defendant. The plaintiff had received from the defendant, and gave him credit for, the sum of 5*l.* 10*s.*; and for the balance, namely, 28*l.* 18*s.* 4*d.*, he now proved his claim. There was no defence set up upon the merits, but in order to defeat the plaintiff's

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right of action, it was shewn that he had not taken out any certificate as an attorney during the years 1814, 15, 17, 18, and 19; and that he had been admitted an attorney of the court of *King's Bench* in the year 1792, and had never been re-admitted. There was no evidence whether he had ever been admitted an attorney of the court of *Common Pleas* at all. Since the year 1819, he had regularly taken out his certificate. Upon this evidence it was contended, that as the plaintiff had at one period ceased to take out his certificate, and had never been re-admitted an attorney of the court of *King's Bench*, of which he had originally been admitted, he must be considered as having never been re-admitted an attorney of any court, and was consequently incapacitated from maintaining any action for his charges for business done as an attorney, by the statute 37 Geo. 3, c. 90. The learned judge, however, was of opinion, that as the business in respect of which this action was brought was done in the court of *Common Pleas*, and there was no evidence that the plaintiff had *not* been re-admitted an attorney of that Court, and there was evidence that he was certificated at the time the business was done, it must be presumed, in the absence of direct proof to the contrary, and which, although negative proof, his Lordship thought it was incumbent on the defendant to produce, that the plaintiff was an attorney of the court of *Common Pleas*, at the time when the work was done, and as such, entitled to maintain the action. The jury, therefore, under his Lordship's direction, found their verdict for the plaintiff, damages 28*l.* 18*s.* 4*d.*, and the defendant had leave to move to enter a nonsuit, upon the point of law.

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*Taddy*, Serjeant, in *Easter* term last, moved accordingly, and obtained a rule nisi; against which,

*Brodrick*, (with whom was *Gurney*), now shewed cause. The fact of the plaintiff having regularly taken

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out his certificate since the year 1819, was *prima facie* evidence of his being an attorney in the year 1824, when the business was done. In order to rebut that case, therefore, it was incumbent upon the defendant to shew conclusively, that the plaintiff was not an attorney at that time, which could only be done by proving that he was not then upon the rolls of *any* court. That the defendant has not done, for he proved only that the plaintiff had not been re-admitted in the court of *King's Bench*, which is not carrying the proof far enough; he ought to have gone on and shewn that he had not been re-admitted in the court of *Common Pleas* also. The plaintiff, therefore, is in a situation to recover for the amount of his bill, generally; but at all events he is entitled to recover for his actual disbursements out of pocket, for he does not sue as an attorney by attachment of privilege, and the money which he has paid to the use of the defendant is clearly recoverable under the money counts.

*Abraham*, (with whom was *Taddy*, Serjt.), *contra*. The statute 37 *Geo. 3*, c. 90, s. 26, enacts, that every attorney, in any court, shall take out a certificate every year. By s. 30, every attorney practising, without a certificate, shall be incapable to maintain any action in any Court, for his fees or disbursements. And by s. 31, every attorney who shall neglect to take out a certificate for the space of one year, shall be incapable of practising in any Court, without being re-admitted. Now looking at these three clauses together, it is clear that the plaintiff is within their operation, and incapable of maintaining this action. It was proved that he omitted to take out his certificate for several years. That was in effect proving that he was *ipso facto* off the rolls, and had ceased to be an attorney. It was further proved, that he was never re-admitted in *this* Court, which raised the presumption that he was never re-admitted in *any* Court. He, therefore, made out no case, for it was a necessary

and material part of his case, to shew that he had been re-admitted in *some* Court. Such proof was easily within his reach, if the fact were so; and his neglecting to adduce it, was conclusive evidence that the fact was not so. Besides, by neglecting to take out his certificate he became incapable of practising in any Court, until he was re-admitted, and was incapacitated from maintaining an action in the court of *King's Bench*, for business done in the court of *Common Pleas*, without proving affirmatively that he had been re-admitted in *both* those Courts.

BAYLEY, J.—The clause of the statute 37 *Geo.* 3, c. 90, upon which this question arises, is a highly penal clause; and a party ought to be brought most clearly within both the letter and the spirit of it, before we can suffer it to attach. The law always presumes *against* illegality, until illegality is clearly proved. Generally speaking, an attorney who sues in an ordinary form of action, is not required to prove his admission and qualifications as an attorney; in ordinary cases his acting as an attorney is sufficient evidence that he is such. In this case it did appear that from the year 1819, to the year 1824, the plaintiff acted as an attorney, and took out his certificate as such. He was originally admitted an attorney in the court of *King's Bench* in the year 1792. For some years he neglected to take out his certificate, and by that neglect he ceased to be an attorney of *that* Court, and of the court of *Common Pleas* also. It was proved that he was never re-admitted in the court of *King's Bench*; but that proof did not extend to other Courts: and in order to defeat his right of action, the defendant ought to have proved that he was never re-admitted in the court of *Common Pleas*. That not being proved, and it appearing that the plaintiff was certificated, and was acting as an attorney in the court of *Common Pleas*, I think we are bound to presume that he was re-admitted in *that* Court, and if so, he has a right to

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conduct business, and to bring an action in *this* Court, although he has not been re-admitted here. I am, therefore, of opinion, that the defendant did not go far enough into proof to support the objection on which he relies, that he has not made out any defence to the action, and consequently that the plaintiff is entitled to retain the verdict which the jury have found for him upon the merits.

HOLROYD, J.—I am also of opinion, that the defendant has not gone far enough with his proof, and that he has not made out any sufficient answer to this action. He has not proved the plaintiff to have been acting illegally, which he was bound to do; for the maxim of law is, *omnia presumantur ritè esse acta*: and the plaintiff's certificate is *primâ facie* evidence of his right, which if unrefuted by evidence of his having no right to practise, becomes conclusive. In *Williams v. The East India Company (a)*, Lord *Ellenborough* cites a case of *Monke v. Butler (b)*, to the same effect. "In a suit for tithes in the spiritual Court, the defendant pleaded that the plaintiff had *not* read the 39 articles; and the Court put the defendant to prove it, though a negative. Whereupon he moved the Court for a prohibition, which was denied: for in this case the law will presume that a parson had read the articles: for otherwise he is to lose his benefice: and *when the law presumes the affirmative, then the negative is to be proved.*" I agree that this rule must be discharged.

LITLEDALE, J.—I am of the same opinion. The statute allows the re-admission of attornies who have neglected to take out their certificates; therefore, the plaintiff by taking out his certificate from 1819 downwards, appears to me to have made out a *primâ facie*.

(a) 3 East, 199.

(b) Rol. Rep. 83.

case, and to be in just the same situation as he would have been in, if it had been a certificate taken out after his original admission. Then, it was for the defendant to rebut that case, by shewing that the plaintiff was not upon the rolls of *any* Court. That he has not done; and we must presume that a party has acted legally, unless the contrary is clearly proved.

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Rule discharged.

LIDGBIRD v. JUDD.


**COVENANT**, by an heir at law, upon an unexpired lease of premises, granted by his ancestor to the defendant. The only material part of the declaration was the statement of the plaintiff's title to the demised premises, which was as follows: "And the said plaintiff in fact further saith, that one *H. L.*, (deceased), being seised in fee of the said premises, demised the same to the said defendant, and that upon the death of the said *H. L.*, the reversion in the said premises descended and came to the said plaintiff, *as cousin and heir at law of the said H. L.*" Special demurrer to the declaration, assigning for cause, that plaintiff hath not stated *how* he was cousin to the said *H. L.*, nor in what manner, in particular, he was related to the said *H. L.*, nor what degree of consanguinity existed between them. Joinder in demurrer.

Where a plaintiff declares as heir at law upon a lease granted by his ancestor, he must shew *how* he is heir at law: a general averment that the demised premises descended to him, *as cousin and heir at law*, is not sufficient.

*Taddy*, Serjt., in support of the demurrer. This declaration is bad upon every principle of pleading. A party who sets up a title by descent, is bound to state his title with precision; for the law presumes that he is acquainted with the particulars of his own title, and that the defendant is unacquainted with them. It was held in *Blackborough v. Davies* (a), that it is sufficient in such a case,

(a) 1 Lord Ray. 684; 1 Salk. 38, S. C.



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for a man to aver that he is frater et hæres, because the very word brother shews a mediate descent, and that there was a common medium both for the deceased and the heir, namely, their father; "which," it is added, "was the grand reason in the case of *Collingwood v. Pace*" (a). But the general description of heir, does not inform a defendant of that of which he has a right to be informed, namely, what title he has to meet; and the addition of cousin does not help the description, because that is a very vague term, and includes various degrees of relationship. But, independently of general principles, *Durham v. Stephenson* (b) is an express authority to shew that the declaration in this case is bad. "There plaintiff brought debt on a bond as administrator, against defendant as heir of his ancestor; upon demurrer, one objection was, that he did not shew *how* defendant was heir. Et per Cur'.—*Where one sues as heir, he must shew his pedigree, and how he is heir, for it lies in his proper knowledge*; but where one is sued as heir, he need not, for the plaintiff is a stranger, and it would be hard to compel him to set forth another's pedigree." Upon general principles, therefore, and upon authority, it is clear that this declaration is insufficient for the cause assigned by the special demurrer.

*Peake, Serjt.*, contrà. If the present statement of title by descent were introduced in a plea or an avowry, instead of a declaration; or, if the land were in question in the suit, the present objection would be good: but in a declaration in a suit, where the land is not in question, the general averment of title as cousin and heir is sufficient. This distinction will be found to pervade all the cases upon the subject. *Heard v. Baskerville* (c) was an action of replevin. The defendant avowed for rent under a demise from his ancestor to the plaintiff, and averred that the lands descended to him *as cousin and heir*. Upon general

(a) 1 Vent. 413; 1 Sid. 193; 1 Lev. 59, S. C.

(b) 1 Salk. 353.

(c) Hob. 355.

demurrer that was held good, for the averment of the mode in which the defendant was heir, must be considered as matter of form only, and therefore could not be objected to on general demurrer. In this case, indeed, the demurrer is special; but if the argument is good, as it seems to be, that in a declaration less formality is necessary than in an avowry, it will follow, that the present objection cannot be supported, even on special demurrer. So in *The Duke of Newcastle's* case (a), which was an action of trespass, a plea of justification under the title of J. S., alleging simply that the defendant was the *heir* of J. S., was held good on general demurrer, because the objection applied merely to matter of form; and yet, in that form of action, it has been always held, that the strictest forms of pleading must be observed. *Dumday v. Hughes* (b) does not apply to the present case, because there it was only decided that *in the count of a writ of right*, it is not sufficient to state that the lands descended to four women, as nieces and co-heiresses of J. S., without shewing *how* they were nieces. In *Champernon v. Godolphin* (c), which was error, to reverse a fine levied by the Earl of Devon, the plaintiff brought the writ as cousin and heir of the Earl, and assigned errors, and brought a writ of scire facias ad audiendum errores, but did not shew in either of the writs *how* he was cousin to the Earl. For this cause the defendant pleaded in abatement of the writ, to which plea the plaintiff demurred, and after argument the Court resolved, that the description of cousin and heir was good enough, without shewing how, in either of the writs. [Bayley, J. But the reason given for that resolution, namely, that the writs were merely to bring the case and the parties before the Court, does not apply in the present case]. Surely, that which is sufficient in a writ of error, as matter of mere personal description, would be sufficient

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(a) 1 Lev. 190.

(b) 3 Bos. &amp; Pul. 453.

(c) Cro. Jac. 160.

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also in a declaration. But there is one case which is decisive, as an authority for saying, that where the land is not in demand, a general description of title is sufficient: *Scavage v. Hawkins* (a). That was a writ of error from the Common Pleas. [Bayley, J. But this is a special demurrer]. The detail of the case will shew that the principle laid down is not affected by that distinction. It was, "Error of a judgment in debt, upon a lease for years. The error assigned was, because the plaintiff, in debt, counted that his father was seised in tail, and made that lease for years, rendering rent, and died seised of the reversion, which descended to the plaintiff, as son and heir of his body, and did not shew the beginning of the said estate; which generally ought to be set forth, where the plaintiff claims by a particular estate, though it is otherwise where he counts of a seisin in fee; but because this was in a count, and not in bar, nor in an avowry, it was held to be no error, and the judgment was affirmed."


*Taddy*, Serjt., in reply, was stopped by the Court.

BAYLEY, J.—I am clearly of opinion, that the declaration in this case is insufficient, for not shewing how the plaintiff is cousin to the party under whom he claims title. The case last cited, and mainly relied on in behalf of the plaintiff, is very distinguishable from the present, for there the defendant had acknowledged the father, and the plaintiff came in as his son. I take the rule to be, in all cases, whether the land be in demand or not, that the plaintiff who claims title by descent, must set out that title with such particularity and precision, as will enable the defendant to know what title he is called upon to meet. Now, that, the present plaintiff most certainly has not done, and therefore, I think his declaration is bad.

HOLROYD, J.—I am entirely of the same opinion. The

(a) Cro. Car. 571.

rule of pleading is certainly such as my brother *Bayley* has described it, and I have always understood the practice to be the same. I have a great number of precedents of declarations by heirs, and I believe there is not one of them in which the plaintiff's title is not fully set out.

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### Judgment for the defendant(a).


(a) *Littledale, J.*, was absent on the winter circuit.

### ROGERS v. WYNNE.

**TRESPASS.** The declaration alleged that defendant broke and entered the close of plaintiff, and with sheep spoiled and consumed the herbage. Plea, of justification, that the locus in quo was part of a common, and that defendant had a right of common for sheep thereon. Replication, that the locus in quo had been inclosed, divided, and separated from the rest of the common, with the knowledge and consent of the owner of the fee. Special demurrer to the replication, assigning for cause, that it was not averred therein, that sufficient common was left for the commoners after the inclosure. Joinder in demurrer.

Trespass for entering plaintiff's close, and with sheep consuming the herbage. Plea, that the locus in quo was part of a common, over which defendant had a right of common for sheep. Replication, that the locus in quo had been inclosed by the consent of the lord. On special demurrer to the replication, held bad, for not going on to state, that after the inclosure there was sufficient common left for the commoners.

*Campbell*, in support of the demurrer. The question of the sufficiency or insufficiency of the common, after the inclosure made, was undoubtedly material to be raised upon this record; the contest between the parties is, upon which of them it was incumbent to introduce in his pleadings, such an averment as would raise that question. Now it is clear, that that was a part of the plaintiff's duty. The owner of the fee had a right to make, or to authorise the making of the inclosure, upon the condition that there was enough of common left for the commoners; therefore

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the party who set up, and relied upon that conditional right, was bound to shew that the condition had been complied with, especially as the right itself was *primâ facie* in contravention of another right. *Greenbow v. Ilsley* (a) is decisive on the point, and must govern the present case. It was there held, that if to an action by a commoner for injuring his right of common, the defendant pleads that he dug turves under a license from the lord, he should add that sufficient common was left for the commoner; and if he do not, the plaintiff need not reply that sufficient common was not left: and upon demurrer to the plea, the Court gave judgment for the plaintiff on that very ground. Lord Coke also mentions a case (b), wherein a commoner brought an assize of common against the lord, to which the defendant pleaded, that he had approved part of his waste, and left sufficient common. The case was decided upon other grounds; but it is cited merely to shew, that the averment by the lord, that he had left sufficient common, appears to have been made as a matter of course, and as a necessary part of his plea. Upon these authorities, it is submitted, that this replication is bad.

*R. V. Richards*, *contrâ*. The fact of the insufficiency of the common, was peculiarly within the observation and knowledge of the defendant as a commoner; and as he contends that the effect of the inclosure has been to infringe upon his right of common, it was for him to put upon the record such statements as were necessary in order to raise that question. *Greenbow v. Ilsley* is distinguishable from the present case, because there the action was in case, and the declaration alleged, that the defendant wrongfully cut turves, whereby the plaintiff could not enjoy his common of pasture in so beneficial a manner as he ought. Here, the fact of the inclosure first appears by the replication, and it was for the defendant, therefore, to

(a) Willes, 619.

(b) 2 Inst. 88.

have answered that replication, by stating what was the effect of the inclosure; namely, that sufficient common was not left for the commoners.

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PER CURIAM.—Enough appears upon the face of the plea to raise the presumption that sufficient common was not left after the inclosure. The plaintiff relies upon the inclosure as his authority for bringing the action; therefore it was for him to shew, affirmatively, that the inclosure was properly made, and that the common left was sufficient. The case in *Willes* is expressly in point, and the inference from the case in *Lord Coke* is very strong. The replication is bad, and the defendant is entitled to judgment on the demurrer.

Judgment for the defendant.

*Richards* afterwards obtained leave to amend, on payment of Costs.

#### GILLARD v. WYSE and others.

DECLARATION in assumpsit, containing counts for money had and received, for interest, and upon an account stated. The defendant pleaded non assumpsit, and paid 145*l.* into Court. At the trial before *Abbott*, C. J., at the *Devonshire* summer assizes, 1824, the plaintiff obtained a verdict, damages 655*l.*, subject to the opinion of the Court upon the following case:—

The defendants for many years past have carried on the business of bankers, at a bank at *Totness*, in the county of *Devon*, called the *Totness* bank, and at another bank at *Newton*, in the same county. The *Totness* bank

*A.* being a stranger, deposits, for a particular purpose, in the hands of *B.*, a country banker at *T.*, the sum of 800*l.*, in local bank notes; 655*l.* of which had been issued by *C.* at *D.*: *B.* transmits the whole of the notes immediately to *C.*,

and is credited with the amount in account by the latter, who re-issues the notes, and stops payment:—Held, that *A.* was entitled to recover the whole amount of the notes from *B.*, as cash received by the latter to his use.

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opens every day at ten o'clock, and closes at four. On *Thursday*, the 18th *March*, 1824, the plaintiff, who was not a customer of the defendants, went to the *Totness* Bank, and paid in there a number of country notes, amounting to about 800*l.*, which were received by the defendants as a deposit of 800*l.*, to bear interest from that day, at the rate of 3*l.* per cent. per annum; to be withdrawn only after twenty days' notice; and the interest to cease from the day of the notice. The notes so received of the plaintiff were all payable to the bearer on demand, and consisted of notes to the amount of 657*l.* of a bank at *Dartmouth*, called the *Dartmouth General* Bank, which was at that time carried on under the firm of *Hine* and Co.; of other notes, to the amount of 30*l.*, of another bank at *Dartmouth*, called the *Dartmouth* Bank, carried on by other persons, under the firm of *Harris* and Co.; and of other notes, of other country banks in the neighbourhood. Of the 657*l.* of the *Dartmouth General* Bank notes, 600*l.* were immediately tied up in separate bundles, containing each 100*l.*, and, with the remaining 57*l.*, and all other notes of the two *Dartmouth* banks received in the course of the day, were put aside into a separate division, marked "*Dartmouth*," to be sent as hereinafter mentioned; the *Totness* bank never paying away the notes of the *Dartmouth* banks in the course of their issues to customers. In the course of the day, the *Totness* bank received 432*l.* of *Dartmouth* and *Dartmouth General* bank notes from other persons; and at the close of the business of the day, all the *Dartmouth* notes which had been so received from the plaintiff, together with the last-mentioned notes, were put up in a parcel, directed to Messrs. *Hine* and Co., *Dartmouth*, and this parcel was afterwards given to the person employed by the Post Office in carrying letters between *Totness* and *Dartmouth*, and it was accordingly delivered to *Hine* and Co., at the *Dartmouth General* Bank, early in the morning of 19th *March*, before the usual hour of

the opening of that bank. The amount of all the notes in the parcel was 1,119*l.*, and before the opening of that bank, the said sum of 1,119*l.* was placed to the credit of the defendants, in the books of *Hine* and Co., the defendants being debtors to *Hine* and Co. to the amount of 340*l.*, as hereinafter mentioned, and the notes of the *Dartmouth General* Bank contained in the parcel were then put into the usual drawers, for the purpose of being re-issued. The bank opened at the usual hour, ten o'clock in the morning, and continued to pay all demands till half-past three in the afternoon, when it stopped payment; but before that time all the notes of the *Dartmouth General* bank, received in the *Totness* parcel, had been paid away to different persons, in the usual course of business. In the course of that day, the *Dartmouth General* bank had also received from different customers, sundry notes of the *Totness* bank, amounting to 50*l.* or 100*l.*; but these were paid after the stoppage, by the clerk of *Hine* and Co., to the executor of Mr. *Hine*, who was at the time of the stoppage in a dying state, and died only one or two days afterwards. It was the practice of the *Totness* bank, at the close of every day's business, to make up parcels of country bank notes, for the different banks with which they corresponded. The correspondence between the *Totness* bank and the *Dartmouth General* bank, was, for the most part, carried on by the postman. The distance from *Totness* to *Dartmouth* is about ten miles. The postman, at that time, left *Totness* for *Dartmouth* about five o'clock, and arrived at *Dartmouth* between six and seven in the morning; and left *Dartmouth* on his return, and arrived at *Totness* about eight in the evening of the same day. The course of business between the two banks was as follows:—If, in the course of any one day, the defendants received any quantity of notes of the *Dartmouth General* bank, or of the *Dartmouth* bank, or of any other bank at *Brixham*, in the same county, at the close of the business of the day they put all such notes into one parcel, and gave it to the postman to

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be delivered to *Hine* and Co. the following morning. If *Hine* and Co., in the course of any one day, received any notes of the *Totness* bank, or of the *Newton* bank, or of another bank at *Totness* carried on by other persons, called the *Totness General* bank, at the close of the business of the day, they put up all such notes into one parcel, and sent it the same evening to the defendants, on the postman's return to *Totness*. If, upon the making up of the parcel of the *Dartmouth General* bank, on the evening of any one day, a balance was left in favour of the *Totness* bank, that balance was ordered to be paid in *London*, by the *London* agents of the *Dartmouth General* bank to the *London* agents of the *Totness* bank, by a letter sent by the *Dartmouth General* bank for that purpose, by the *London* post of the same evening; but if, on the contrary, upon the making up of such parcel, the balance was in favour of the *Dartmouth General* bank, and the *Totness* bank did not receive a sufficient quantity of notes in the course of the next day to meet that balance, the difference was ordered to be paid in *London*, by the *London* agents of the *Totness* bank, to the *London* agents of the *Dartmouth General* bank, by a letter sent by the *Totness* bank for that purpose, by the *London* post of that evening.

On the morning of 17th *March*, the accounts between the two banks were exactly balanced; but on the evening of that day, the *Dartmouth General* bank sent, by the postman, a parcel for the *Totness* bank, containing 25*l.* in *Totness* notes, and a good check upon the defendants, drawn by one of their customers, for 315*l.* The parcel arrived, as usual, after the banking hour, and was not opened till the opening of the bank on the following morning; when the *Totness* bank became their debtor to the amount of 340*l.*

On 20th *March*, the defendants wrote and sent to *Hine* and Co., the following letter: "Gentlemen, We received your notes on *Thursday*, and remitted them to you on *Friday* morning. At that time we supposed you had a quantity

of *Totness* and *Newton* notes ; and we expect, as a common principle of honour, that you will immediately send them to us, together with the notes of Messrs. *Harris* and Co., which we sent in the parcel. We also beg you to return all those notes which our parcel contained, beyond the balance we owed you, and the amount of the *Newton* and *Totness* paper which you held at the time you received our parcel. *Wyse* and Co.”

The question for the opinion of the Court is, whether the plaintiff is entitled to recover the whole, or any part, of the said sum of 655*l*. If they shall be of opinion that the plaintiff is entitled to recover the whole, or any part, the verdict to stand or to be reduced accordingly ; if otherwise, the verdict to be entered for the defendants, and the costs of the special jury to be allowed on taxation.

*Carter*, for the plaintiff. The claim of the plaintiff upon the defendants is founded, not upon any laches of theirs with respect to notice, for it is agreed, although not stated in the case, that the defendants sent timely notice to the plaintiff of the stoppage of the *Dartmouth* bank, and the consequent dishonour of the notes he had paid in ; but upon the negligence of the defendants in leaving the notes in the hands of the makers. The plaintiff contends that by so doing the defendants have incapacitated themselves from returning the notes to him, and that by their negligent course of dealing with the *Dartmouth* bank, they have made the notes their own, and themselves creditors of the *Dartmouth* bank for the amount. If the notes had been lost in transit to *Dartmouth*, the defendants must have borne the loss ; and if they had previously paid the plaintiff the full value of them, upon the deposit, they could not, under such circumstances, have recovered it back ; *Bayley on Bills* (a), *Ex-parte Greenway* (b), *Pierson v. Hutchinson* (c). If the plaintiff cannot recover against the

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(a) Page 297.

(b) 6 Vesey, 812.

(c) 2 Camp. 212.

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defendants, he will be wholly without remedy ; for the defendants cannot produce the notes which he deposited with them ; they have paid them away to others, which others are actually the makers of them ; and those makers have re-issued them to third persons, who are innocent and bonâ fide holders ; consequently, the plaintiff is entirely precluded from suing upon the notes. The only case which in its circumstances resembles the present, is that of *Hayward v. The Bank of England* (a). There the plaintiff kept cash at the Bank of *England*, and paid in a banker's note ; the runner to the bank left it at the banker's the next morning, and called for the money in the afternoon, but in the interval the banker had stopped ; and though this appeared to be the usual practice at the Bank, *King, C. J.*, said, it was dangerous to suffer persons to deal with notes in that manner, and that the Common Pleas were of that opinion in the like case ; and he directed the jury to find for the plaintiff, which they did. There is another case which, in *principle*, applies also to the present ; *Powell v. Roach* (b), where it was ruled by Lord *Ellenborough*, that the holder of a bill, although a banker, and acting in the ordinary course of business, was not justified in giving up the bill to the acceptor, merely upon receiving his check for the amount ; and that, in the event of the check being dishonoured, he would by so doing, discharge the drawers and indorsers, because they had a right to insist on the production of the bill, and to have it delivered up on payment by them. So here the defendants, by delivering up the notes, have discharged the makers, and released them from the claim which the plaintiff would otherwise have had against them. But the defendants have a remedy against the *Dartmouth* bank, though the plaintiff has not ; and therefore, as between the plaintiff and the defendants, these notes must be taken to have been paid by the makers. The amount has been carried to the

(a) 1 Stra. 550.

(b) 6 Esp. 76. See Chitty on Bills, 368.

credit of the defendants, in their account with the *Dartmouth* bank; and has therefore become a book debt between parties, with whom the plaintiff, with reference to those notes, can have nothing at all to do. The notes have entirely passed away from the plaintiff; and have been treated by the defendants, in their transactions with the *Dartmouth* bank, as paid notes; in short, *as cash*. At any rate, the plaintiff is entitled to recover the amount of the balance due from the defendants to the *Dartmouth* bank at the time when the parcel was sent, because that balance must be taken to have been paid with the plaintiff's notes: for the case does not state what portion of these notes was applied in discharge of the balance; and it is not at all probable, that any particular portion was selected for the purpose of being so applied. The plaintiff, therefore, is at all events entitled to a verdict: and under the circumstances of this case, and upon general principles, it is submitted, that that verdict ought to stand for the full amount of damages given by the jury.

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*Coleridge*, *contrá*. The question in this case is, whether the defendants have been guilty of any breach or neglect of duty, express or implied, towards the plaintiff. They contend, that they have not. The cases cited on the other side do not apply. *Hayward v. The Bank of England* (a), is no authority against the defendants, for it is opposed by contrary decisions upon similar facts, both in prior and subsequent cases; *Turner v. Mead* (b), and *Hoar v. Da Costa* (c). *Powell v. Roach* (d) was decided on the ground that the holder of the bill had been guilty of negligence, and in that respect is quite distinct from the present case; for here the defendants owed no duty to the plaintiff, and therefore could be guilty of no negligence. How could these defendants owe any duty to this plaintiff? He was not a customer of theirs, but a perfect stranger; and in that

(a) 1 Stra. 550. (b) 1 Stra. 416. (c) 2 Stra. 910. (d) 6 Esp. 76.

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character he paid in a quantity of notes of four other country banks. He must have known that those notes would not remain in the hands of the defendants, but that they would, in the ordinary course of country business, be presented to the different bankers by whom they were payable. The case states that the notes were "received as a deposit," but neither of the parties could have understood the transaction as an actual deposit in the strict sense of the word, nor as a payment and receipt of *money*, absolutely, and at all risks. If the contrary argument is upheld, all country bankers will be placed in a most perilous, and indeed ruinous situation. In point of fact, the notes of other country bankers are never paid into, or received by, country bankers, as cash; the solvency of the bankers, or the payment of the notes, is never guaranteed; the bankers are considered as mere agents, whose whole duty is to use ordinary diligence in procuring the notes to be paid. The defendants, therefore, were the agents of the plaintiff, to that extent, and no further. If the notes had turned out available, the amount would have been money in the hands of the defendants to the use of the plaintiff; but if not eventually paid, or if the makers had stopped at the time when paid in, there would have been no obligation on the defendants to be answerable for the amount. Then what diligence was the plaintiff entitled to expect, and what were the defendants bound to exercise? He dealt with them as country bankers, and he could only expect that they would deal with his notes in the same manner, as country bankers ordinarily deal with one another. He was no customer, but he knew that they were country bankers; and they did, in point of fact, conduct this particular transaction in the same way that they conducted other similar transactions in the course of business. What could the plaintiff expect more? He paid in notes of four different bankers. Were the defendants to send instantaneously and specially to every one of those bankers, present the notes, and demand payment? Clearly not;

such a step would have been unreasonable in itself, and entirely out of the ordinary course of business ; such activity is not required even of *London* bankers in mutual dealings with respect to checks, *Robson v. Bennett* (a). It appeared by that case, that it is customary among the *London* bankers, in dealings with each other, not to pay any check which is presented by or for another banker, after four in the afternoon ; but merely to inform the person presenting it, whether it is a good check or not : and if the check is approved, it is marked accordingly, and considered entitled to priority of payment the next day. And it was held, that it was not necessary to present a check, so marked for payment, *at the banking house*, that is, at nine in the morning, on the next day, but that it was sufficient to present it *at the clearing house*, that is at five in the afternoon. Now, even according to this rule, the defendants have been guilty of no laches ; nay, they have even used greater diligence than they were in strictness bound to use ; for they were not bound to send the notes for presentment before the post of the 19th of *March*, which would not have reached *Dartmouth* till the 20th, whereas they did send them on the 18th, and they reached that place on the 19th, before the opening of the bank. But independently of this, it is contended that the plaintiff has not been damnified, and therefore, without regard to the question of negligence, he has no cause of action. He may prove under the commission of bankrupt against the *Dartmouth* bankers for the full amount of these notes, either in his own name, or in the names of the defendants. It does not appear that he has lost any remedy over against the person from whom he took the notes, and in all probability he had no such remedy to lose, for it is most likely that he had held the notes some time ; at all events it cannot be assumed that he had any remedy over, for if he had, and had lost it by means of the defendants, the case would have stated that fact. Upon these two grounds, therefore, first,

(a) 2 Taunt. 289.

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that the defendants have been guilty of no laches or negligence, and consequently have incurred no liability; and second, that the plaintiff has sustained no injury, and lost no remedy, and consequently has no cause of action, the judgment of the Court must be for the defendants.

*Carter*, in reply, was stopped by the Court.

BAYLEY, J.—I think there can be no doubt the plaintiff is at all events entitled to recover to the amount of 340*l.*; but I am of opinion that he is entitled to recover to the extent of 655*l.* The defendants are in the habit of receiving, from time to time, notes payable by other bankers than themselves, and they must, of course, adopt some mode in order to obtain payment of such notes; and there must be some person in the character of agent for them, in the several places where they are made payable. The defendants select their own agent for that purpose, and they must be bound by what he does. Now it is the duty of such an agent to present such notes for payment, and to take care, when they are presented, that something equivalent to payment should take place. Here the course of dealings between these defendants and the *Dartmouth General* bankers, authorises the latter to do that, which as between them and the defendants, is equivalent to payment, namely, to take possession of the notes transmitted, and to issue them again for their own purposes, giving the defendants credit in account for the amount. In this case the agents for the *Totness* bank are the *Dartmouth General* bankers; and with respect to the notes which they are to present to other persons, they are of course to take care to receive the money when they are presented. With respect to their own notes, they being the agents for the *Totness* bank, instead of actually receiving money, their course of dealing is, to enter the amount of the notes remitted, to the credit of the *Totness* bank, in their accounts, as soon as received. That course of dealing, must, in my opinion, be considered, with reference to third persons, exactly as

if the *Dartmouth* bank had been paid money; for the course of dealings between them and the *Totness* bankers, authorises the *Dartmouth* bank to say, that those notes are at that time paid, and also justifies third persons from whom the *Totness* bankers have received those notes, in considering them as actually presented and paid. It is clear that if they had been presented by a third person, he would have got the money upon them, and have had it in his own hands; but if the *Totness* bankers make the *Dartmouth* bankers their agents, to receive the money, and in fact receive credit for the amount in their books, that is exactly the same as if the agents had paid the money. But here the defendants do more, for they authorise the *Dartmouth* bankers to deal with the notes as if they were actually paid. If the *Dartmouth* bankers, by entering the amount of the notes to the credit of the defendants, are not to be considered as having paid them, they would have had no right whatever to re-issue the notes. Every one of these notes is remitted by the defendants to the *Dartmouth* bank, as a payment in reduction of their account, and upon that footing credit is given, otherwise they must have been returned to the defendants. In this point of view, this is to be considered with reference to third persons, as a money payment. Upon this short principle, therefore, namely, that the course of dealings between these parties, renders the *Dartmouth* bank agents for the *Totness* bank; and that the entering of these notes to credit by the former in favour of the latter, is equivalent to payment; I am of opinion that the plaintiff is entitled to retain the verdict for the whole sum of 655*l*.

HOLROYD, J.—I am of the same opinion. The 800*l*. paid by the plaintiff into the hands of the defendants, was received by the latter as cash, payable with interest; and if it had been payable with 5*l*. per cent., instead of 3*l*. per cent., it would have borne such interest, without being

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considered usurious, not merely from the time when the defendants should have actually received the cash for the notes, but from the very moment they were paid into the defendants' hands; for they were passed into their hands at that time as cash. I do not mean to say, that if the notes had turned out to be worth nothing, and there had been a demand and refusal of payment, (agreeably to the custom of merchants as applicable to promissory notes), by the bankers who had issued them, the defendants would not have had a right to consider the deposit as null pro tanto; or to recover upon the notes themselves as against the plaintiff who had made the deposit, by reason of their being dishonoured; but this is a different case. Here the defendants, instead of sending a person to obtain cash for the notes, transmit them to the persons who are to pay them, not to receive the cash in return, but for the purpose of being credited in account with those persons for the amount. In the plain understanding of such a transaction, that is, in effect, payment of the notes by the *Dartmouth* bank, and holding the amount to the credit of the defendants. It is the same thing exactly as if the defendants had paid so much cash into the hands of the *Dartmouth* bank, to be placed to their credit as an account to be drawn upon. As between the defendants and the *Dartmouth* bank, it is a cash payment; for it appears from the case, that the *Dartmouth* bank treated the notes as their own, by re-issuing them, which they would have no right by law to do, if they had not become their property; or if they were not entitled so to do, the amount could have been recovered back by the defendants as money had and received to their use. Inasmuch, therefore, as the 800*l.* originally deposited by the plaintiff with the defendants in the shape of notes must be considered as cash, and as those notes had been actually paid, and the amount thereof remained in the hands of the *Dartmouth* bank to the use of the defendants, and the *Dartmouth*

bankers being in that respect, with regard to receiving and paying, the agents of the defendants, I think the action is maintainable for the whole sum of 655*l*.

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LITLEDALE, J., concurred.

Postea to the Plaintiff.

GOODTITLE, on the demise of ROEBUCK v. OXLEY.

**EJECTMENT** for certain lands, situate at *Louth*, in the county of *Lincoln*. At the trial before *Park, J.*, at the last *Lincolnshire Lent* assizes, the case was this. *Joseph Owtram*, by his will, dated 21st *August*, 1764, and duly executed and attested for the passing of real estates, devised as follows :—" I give and bequeath to my wife, *Jane Owtram*, all my freehold estate in *Louth*, for her life ; and after her decease, to my son, *Godfrey Owtram*, for his life ; and at his decease, to my grandson, *Joseph Owtram*. If it should happen that my son, *Godfrey Owtram*, should at any time marry *Sarah Sharpe*, now living at *Tailly* in the county of *Lincoln*, I leave him only one shilling ; and my freehold estate I then give and bequeath to my grandson, *Joseph Owtram* ; and, if my son, *Godfrey Owtram*, should marry any other woman, have a son lawfully begotten, and my grandson should die without male heir, then, his second son shall have all my said freehold estate ; and out of my personal estate, I give and bequeath to my grand-daughter, *Mary Owtram*, 80*l*., on condition she behaves well, and marries to her father's approbation and consent. My son, *Godfrey Owtram*, shall keep the money while he lives ; and if it should happen that my son, *Godfrey Owtram*, die without heirs male, then, I give and bequeath all my estate to my sister, *Jane Rogers*, *Hannah Scothern*, and *Joseph Owtram*, the son of *Godfrey Owtram*, and their heirs,

A devise of real estate " to *A.*, *B.*, and *C.*, and their heirs, to be sold, and the money to be equally divided amongst them ;" is a devise in joint tenancy of the land, and in tenancy in common of the produce of the land when sold : therefore the heir at law of *A.* cannot maintain ejectment for the land, without giving direct evidence of the deaths of *B.* and *C.*

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*to be sold, and the money to be equally divided amongst them."*


The testator died in 1765, without altering or revoking his said will, leaving his wife, *Jane*, him surviving. Upon her death, in 1775, *Godfrey Outram* took possession of the estate, and continued to receive the rents until his death in 1807, when his son, *Joseph Owtram*, took possession, and continued to receive the rents until 1809, when he died without issue, but leaving a will, by which he devised "to *Edward Shelton*, of *Great Grimsby*, merchant, all my messuages, closes, lands and hereditaments, of which I may die possessed," chargeable as in the will mentioned. Under this devise, *Edward Shelton* took possession of the estate devised as above by the original testator, *Joseph Owtram*, and afterwards sold the same to the defendant, who thereupon took possession thereof. The plaintiff claimed as heir at law of *Hannah Scothern*, one of the three devisees in remainder under the will of the original testator, and of whom she was alleged to have been the survivor; but no evidence being produced at the trial of the deaths of the two other devisees, the learned judge was of opinion that the plaintiff had made out no title, and therefore directed a nonsuit.

*Vaughan*, Serjt., in *Easter* term last, obtained a rule nisi for setting aside the nonsuit, and for a new trial.

*Denman*, C. S., now appeared to shew cause, but the Court desired to hear


*Vaughan*, Serjt., in support of the rule. The ground upon which the nonsuit proceeded was, that the learned judge construed the devise in remainder as a devise in joint tenancy, and therefore considered evidence of the deaths of all the joint tenants necessary. Now, in the first place, admitting that the devise was in joint tenancy, direct proof of the deaths of the other joint tenants was not requisite; for after such a lapse of years, and under

such circumstances as appeared in this case, their deaths might have been presumed; and at least that question ought to have been left to the jury; *Doe v. Jesson* (a), and *Doe v. Griffiths* (b). But, in the second place, the learned judge was mistaken in his construction of the will, for it is clear, from the language of the testator, that he intended these three parties to take, not as joint tenants, but as tenants in common. He gives "all the estate to them, and their heirs, to be sold, and the money to be equally divided amongst them." Now that clearly contemplated a division of the estate among the three, and constituted them tenants in common; and in that case, the lessor of the plaintiff, whose title as heir at law of *Hannah Scothern* was not disputed, was clearly entitled to recover for one third part of the estate. In either view of the question, therefore, it is submitted that there is good ground for sending the case for the consideration of another jury.

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BAYLEY, J.—I am clearly of opinion that the three devisees were joint tenants, and not tenants in common, of the land devised, and, therefore, that this rule must be discharged. The plaintiff claims as grandson and heir at law of one of the three devisees, whose death is admitted; and if the land was devised to those parties as tenants in common, he is entitled to recover one third part of the land. But was the land so devised? I think, clearly not. It is devised, in the exact words of the will, "to my sister, *Jane Rogers, Hannah Scothern, and Joseph Owtram, the son of Godfrey Owtram, and their heirs, to be sold, and the money to be equally divided amongst them.*" As respects the land, it is clear to me that this is one joint devise, and that there is no division or appointment except as respects the personal effects, the money which might be the produce of the land when sold. In so construing the will, it seems to me that we are plainly effectuating the intent and object of the testator; for, supposing one of the devisees

(a) 6 East, 80.      (b) 15 East, 293.

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had died without issue, in the lifetime of the testator, the devise, if several and not joint, would, as to that one, have been a lapsed devise; or, suppose he had then died leaving issue an infant child, the land could not legally have been sold until that child had attained the age of 21; and the main object of the testator, namely, the sale of the land, and the division of the money, must have been delayed during the whole of that interval. Then, if the three devisees were joint tenants of the land, *cadit quæstio*, for there was no evidence produced at the trial of the decease of two of them, which it was incumbent upon the plaintiff to produce. If, therefore, we are right in holding that this was a joint tenancy, and not a tenancy in common, which I am quite satisfied we are, the nonsuit was right, and this rule ought to be discharged.

HOLROYD, J.—The operation of the will is perfectly distinct with respect to the land itself, and the produce of it when sold. Of the first, it creates the devisees joint tenants; of the second, it creates them tenants in common. But the latter cannot be suffered to control the former; for if it was, the whole intention of the testator would be destroyed at once.

LITTLEDALE, J.—I am of the same opinion. The devisees clearly took a joint estate in the land. The words, “to be equally divided amongst them,” in the will, apply exclusively to the money; they have no reference to the land. In *Prince v. Heylin* (a), the rents of the land were by the will to be divided among the devisees; that was the same as if the testator had directed the land itself to be divided among them: and that constitutes the whole distinction between that case and the present. We are bound, if possible, so to construe a will, as to give effect to the whole of the testator's intention, and the construction put upon this will effects that object; for we thereby decide

(a) 1 Atk. 493.

that there was a joint tenancy as to the real estate, and a tenancy in common as to the personal estate, and that the devisees were only trustees of the first for the purpose of effecting a sale, but were cestuis qui trust as to the produce of it when sold.

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Rule discharged.

CURTIS and another, assignees of GEORGE LAING, a bankrupt, v. BARCLAY.


**ASSUMPSIT** for money had and received. At the trial before *Abbott, C. J.*, at the *London* adjourned Sittings after *Trinity* term, 1823, a verdict was found for the plaintiffs, damages 667*l.* 11*s.* 6*d.*, subject to the opinion of the Court upon the following case:—

The plaintiffs are assignees of the estate and effects of *George Laing*, a bankrupt, under a commission of bankrupt, issued against him, dated 29th *January*, 1819. The act of bankruptcy was committed in the early part of *January*, 1819. The commission, although issued in *January*, was not opened until 31st *August*, 1819. The bankrupt carried on business in *London* as a merchant, and exported a considerable quantity of goods to the *West Indies*, in the month of *September*, 1818. *James Laing* was the agent of the bankrupt, and had the superintendence and management of the merchandize so exported. In the month of *September*, 1818, the bankrupt and the house of the defendant, which then consisted of himself and his brother, (since deceased), carrying on business under the firm of *Barclay*, brothers, came to the arrangement set forth in the following documents, then signed, by the parties.

Where an agent has a general authority to receive and sell goods, and out of the proceeds to repay himself his advances, charges, and commission, the costs of an action, and a reference thereof, against a wrong-doer, who withholds the possession of the goods, *bonâ fide* incurred for the recovery of the goods, are legal charges upon the goods, and may be set off by the agent in an action brought against him by his principal for the balance of the proceeds of the goods.

*London, Sept. 3, 1818.*

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*Mr. James Laing,*  
*Demerary.*

SIR,

Mr. *George Laing* of this city has done us the favour to give us your address, and has made to us the following proposition in your behalf; viz., that we should give you a letter of credit to the extent of 30,000*l.* in order to enable you to purchase produce to load to this port the *William Penn*, the *Henry*, and the *Susan*, now on their voyage to your colony—that we should accept your drafts on us at 90 days' sight, on receiving invoice and bill of lading, with orders for insurance to the extent of 90*l.* per ton for coffee, 28*l.* per ton for sugar, 1*s.* 6*d.* per gallon for rum, and 1*s.* 6*d.* per lb. for cotton, and he directs that the balance of the proceeds of these cargoes, after deducting our advances, charges, and commission, should be paid to him, Mr. *George Laing*. In reply to this proposition, we hereby consent to make the advance required, upon the terms described (that is to say, at the rate of 90*s.* per 112 lbs. *British* for coffee, 28*s.* per 112 lbs. *British* for sugar, 1*s.* 5*d.* per lb. *British* for cotton, and 1*s.* 6*d.* per gallon *British* for rum) on receiving the bills of lading filled up to our order, with the particular of freight specified, and accompanied by an order for insurance: on receiving these documents, and no irregularity appearing, we shall accept your drafts at the usual date to the extent of 30,000*l.*

*Barclay, brothers.*


On the 18th *March*, 1819, the defendant received the following letter and bill of lading from *James Laing*.  
Per ship *Richard* for *London* direct.

*Demerary, 23d Jan. 1819.*Messrs. *Barclay, brothers.*

GENTLEMEN,

I had the pleasure on the 15th instant ordering insurance per *Susan*, *D. Gibson*, to ex-


tent of 800*l.* sterling, and now beg leave to wait on you with bill of lading for 41 puncheons of rum, and 14 half-tierces of coffee, being the whole I could get on board the *Susan*. You will please observe that this shipment comes far short of the sum insured, so that you will have to cancel 250*l.* at least, or transfer the interest in the policy to the brig *Henry*, *W. Lowes*, master, now loading, by which vessel you will receive a shipment of considerable magnitude, of which I'll timely advise, as well of any bill I may be obliged to draw on account of the present produce per *Susan*.

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*James Laing.*

The *Susan* had been chartered by the bankrupt. The ship arrived in *London*, with the goods mentioned in the bill of lading, in *April*, 1819. The defendant demanded them of the captain as consignee under the bill of lading. The captain claimed to have a lien on the goods for the freight due to him under the charter-party. The defendant refused to pay more than the freight due under the bill of lading, and upon the captain's refusal to deliver the goods upon receipt of such freight, the defendant and his late partner, on 17th *April*, 1819, brought an action of trover in their own names against the captain for the non-delivery pursuant to the bill of lading. The cause was referred to the arbitration of two barristers at law, but no award being made, the cause was tried, and a verdict obtained in favour of the present defendant, and his said late partner, who, in pursuance, received the proceeds of the goods from a broker, who had been employed by consent of the defendant and the captain, to receive the proceeds of the sale of the goods, and retain the same, as a stakeholder. The proceeds, amounting to 737*l.* 2*s.* 8*d.*, were paid to Messrs. *Reardon* and *Davis*, the attornies for the now defendant, on the 28th *November*, 1820, and by them paid over, or accounted for, to the defendant. The costs of insurance, and other charges, which the defendant was entitled to retain, and be reimbursed, out of



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the said proceeds, amounted to 67*l.* 11*s.* 2*d.* The costs incurred by the defendant, in the cause and arbitration, amounted to 167*l.* 11*s.* 6*d.* The now defendant has not been able to obtain payment of these costs from the captain, who is insolvent, in *Scotland*. In *May*, 1819, the defendant received the following letter from *James Laing*.

*Demerary*, 10th *March*, 1819.

Messrs. *Barclay*, brothers.

I annex a copy of my letter per brig *Henry*, and inclose duplicate bill of lading per the said vessel. I beg leave to advise my draft on you, 4th instant, favour of *George Ross*, esq., at six months' sight, exchange 12 per 500*l.* sterling: having an opportunity of placing a bill of that extended sight I avail myself hereof, to which please pay the necessary attention.

*James Laing*.

The bill of exchange referred to in the above letter, which was the only one drawn by *James Laing*, was afterwards presented for acceptance to the defendant, who refused to accept the same. On 2d *July*, 1819, the defendant received the following letter from *James Laing*.

*Demerary*, 11th *May*, 1819.

Messrs. *Barclay*, brothers, *London*.


GENTLEMEN,

Please pay over to Mr. *George Laing* the balance of proceeds of *West India* produce shipped by me to your address, per brig *Susan* and *Henry*.

*James Laing*.

On 16th *August*, 1819, the defendant received a letter from *James Laing*, complaining of the refusal to accept the bill for 500*l.*, and stating, that in consequence thereof, he must decline making any further shipments. After the defendant's refusal to accept the bill, *James Laing* procured it to be paid by the defendant, out of funds belonging to himself, and commenced an action against the defendant to recover the damages which he alleged he had sustained by the defendant's refusal to accept the bill;


and he obtained a verdict against the defendant for 525*l.*, viz., 500*l.* amount of the bill, and 25*l.* damages, and ultimately recovered a judgment thereupon for that sum and costs, which the defendant, in *Hilary* term, 1823, paid (a). The defendant has paid 4*s.* 6*d.* into Court, and if he is entitled to set off against, or to deduct from, the demand in this cause, the said sum of 167*l.* 11*s.* 6*d.*, the amount of the said costs, and also the said sum of 500*l.*, the amount of the said bill of exchange, the plaintiffs' demand will be satisfied by such payment into Court and set-off.

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The question for the opinion of the Court is, whether the defendant is entitled to set off, or to deduct, in this action, the said sum of 167*l.* 11*s.* 6*d.*, or the said sum of 500*l.* If the Court shall be of opinion that the defendant is entitled to set off either of those sums, but not the other, the verdict is to be reduced by deduction of the set-off so allowed ; but if the Court shall determine that the defendant is entitled to set off both those sums, a nonsuit is to be entered.

*F. Pollock*, for the plaintiffs. It must be admitted that the defendant is entitled to set off the 500*l.*, the amount of the bill ; but the 167*l.* 11*s.* 6*d.*, the amount of the costs, stands on very different grounds. A portion of the latter sum consists of the costs of the reference of the action brought by the defendant against the captain, which neither the one had any right to receive, nor the other any obligation to pay ; for, in the first place, no award was ever made, and therefore the reference turned out altogether nugatory and abortive, and in the second place, the reference was made subsequently to the issuing of the commission against *George Laing*, when the defendant had no power or authority to make it. And the latter observation applies as well to the costs of the action, as to those of the reference. The moment the commission of bankrupt issued against *George Laing*, the defendant's character and

(a) *Laing v. Barclay*. Ante, vol. ii. 530.


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authority, and rights, as his agent, ceased and expired, and he was not entitled to retain the goods at all, except in the nature of a lien, as an indemnity for his own claim. Then, charges incurred in prosecuting, whether before the Court or before an arbitrator, an action for the recovery of those goods, cannot be set off against the claim of the assignees to the surplus proceeds of the goods, after satisfying so much of the defendant's claim as existed before the bankruptcy. At all events, the costs of the reference cannot be so set off, because they were incurred after the bankruptcy, and were besides a frivolous and unnecessary expense, and one which it was not properly within the scope of any agent to incur.

*Campbell, contra.* There is no distinction between the costs of the action and those of the reference. They were both fairly and bonâ fide incurred for the benefit of all the creditors, and are both the legitimate subjects of set-off in this action. This is an action of assumpsit for money had and received; an equitable action, in which the plaintiffs can recover no more than they are in equity and in conscience entitled to receive. What money did the defendant ever receive to the use of the assignees, or of the bankrupt? Neither the one nor the other had any claim against him beyond the net balance of the proceeds, after deducting all his advances, charges, and commission; and that balance he has paid into Court. Then the only question is, whether these costs are *charges* properly incurred by the defendant in respect of the goods, within the fair meaning of the term; and it is difficult to conceive upon what ground it can be denied that they are. The legal property in the goods was vested in the defendant, by the delivery to him of the bill of lading; and the expense of making them available to him as a security for his advances, must be considered as a reasonable part of his charges. The plaintiffs, therefore, have been already paid all they are entitled to, namely, the net balance of the

proceeds of the goods, and this action is not maintainable.

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*F. Pollock*, in reply. The legal property in the goods never vested in the defendant; he was a mere agent, and held them only in that character. The property in the goods remained in the bankrupt, down to the time of his bankruptcy, and from that moment vested in the plaintiffs, as his assignees. Suppose the defendant had become bankrupt with the goods in his possession; would they have passed to his assignees? Clearly not: for he had only a special and limited property in them; he could only hold them, either as an agent for *George Laing*, or as a security for his own advances. Then, it is impossible to say that these costs were properly incurred, either as an act done for the benefit of all the creditors, or as a *bonâ fide* charge upon the goods themselves.

*Cur. adv. vult.*

Judgment was afterwards delivered by


BAYLEY J. This was an action by the assignees of *George Laing*, against the defendant, as the surviving partner of his brother, to recover two sums; one of 500*l.* and the other of 167*l.* 11*s.* 6*d.*; and the question was, whether the defendant was entitled to set off, against the plaintiffs' demand, the sum of 500*l.*, the amount of a bill of exchange, which the defendant's house had paid, and the sum of 167*l.* 11*s.* 6*d.*, the amount of certain costs which the defendant's house had incurred; or either of them. The plaintiffs had a verdict for 667*l.* 11*s.* 6*d.*, which included both the sums I have mentioned, and which was the balance of a sum of 757*l.* 2*s.* 8*d.*, received by the defendant's attornies, for the defendant's house, after the bankruptcy of *George Laing*, as the proceeds of certain goods shipped from *Demerary* by *James Laing*, in

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the month of *January*, 1819. The facts relating to those goods, gave rise to the questions in this cause; and they were these:—In the month of *September*, 1818, it was agreed between *James Laing* and the defendant's house, that the latter should accept bills to be drawn upon them by the former, to the extent of 30,000*l.*, on their receiving bills of lading, made out to their order for *West Indian* produce; and that after deducting their advances, charges, and commission, the balance should be paid to *George Laing*. The object of this arrangement was, that they might sell the goods and reimburse themselves the amount of the money they advanced on the bills of exchange. In pursuance of this agreement, goods were shipped at *Demerary*, and bills of lading making them deliverable to the defendant's house, upon their paying the freight, were transmitted to them; and a bill of exchange for 500*l.* was drawn by *James Laing* upon the defendant's house, which they were eventually compelled to pay. The amount of that bill constitutes one of the sums sought to be recovered in this action; but the claim as to that was, upon the argument of the case, candidly and properly abandoned; and the question is now really confined to the other sum of 167*l.* 1*l.* 6*d.* The facts with respect to that sum were these. When the goods shipped by the *Susan* arrived, which was in the month of *April*, 1819, the Captain wrongfully refused to deliver them according to the terms of the bill of lading, namely, upon payment of freight for the goods, and insisted upon payment of the whole freight under a charter-party. In compelling him to deliver the goods, the defendant's house incurred an expense of 167*l.* 1*l.* 6*d.*; which was expended, partly in the costs of the action they brought against him, and partly in the costs of an unsuccessful reference of that action. It was contended in argument, that there was a distinction between these two species of costs, and that even if the defendant was entitled to set off the costs of the action, he could not, at all events, set off the costs of

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the reference. The validity of that distinction depends, as it appears to us, upon the power which, under all the circumstances, the bills of lading gave to the defendant's house; for if the effect of the bills of lading was to authorise the defendant's house to act for the benefit of all parties interested, and to protect, not only their own rights, but the rights of those also to whom the property would belong, when their rights should be satisfied; then, they would be entitled to reimburse themselves all these expenses out of the proceeds, whenever they yielded a profit. Now, was not that the effect of the bills of lading? In the first instance, undoubtedly, the bills of lading entitled them exclusively to the possession of the goods: but, was that possession to be for their own benefit only; to give them the entire property? Clearly not. They were first to pay themselves; but as soon as their demand was satisfied, their right expired: and whatever remained was to be paid over to *George Laing*. The possession of the goods was withheld by a wrong-doer, and the defendant's house then stood in a twofold character; they had a right for their own benefit, and it was their duty for the benefit of *George Laing*, to take proper steps to compel the delivery of the possession; and if so, the expenses properly incurred in obtaining the possession constituted a *bonâ fide* charge upon the goods. They were to be repaid out of the proceeds of the goods the advances they had made; but the goods could pay them nothing until they came into their possession: and when they did get possession, these expenses had been incurred in obtaining possession. Repayment of a party cannot be said to begin, until the discharge of such expenses is entire and complete. If a debtor assign a claim for 500*l.* to a creditor, and the creditor unavoidably incurs an expense of 100*l.* in recovering the 500*l.*, how much is his debt diminished? Not 500*l.*, the sum that he recovers, because 400*l.* is all that really goes into his pocket; therefore his debt is diminished to the extent of 400*l.* only. So here, what ultimately went into the

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pockets of the defendant's house, was not the 667*l.* 11*s.* 6*d.*, which the goods produced, but the 500*l.* only, which it is admitted they have a right to keep to reimburse themselves the payment of *James Laing's* bill. They were in a situation of considerable difficulty at the time when the goods arrived. The captain, who had been selected by *James Laing*, but who was *George Laing's* agent in this matter, wrongfully refused to deliver the goods. The commission of bankrupt against *George Laing* had issued, although it had not been opened, at that time: he therefore was not in a situation to offer any advice; and as his assignees were not then appointed, there really was no person to whom the defendant's house could apply for advice or guidance; as to the course they should pursue. Under such circumstances, we think they were justified in adopting the measures they adopted. If any part of these costs had been wantonly or improperly incurred; if the reference had been a fraudulent or unnecessary step; if there had been any negligence or misconduct on the part of the defendant's house; these were all questions peculiarly for the consideration of the jury, and would doubtless have been left to them. But no such imputation has even been thrown out; and that being the case, we are of opinion, that the defendant is entitled to set off the whole sum of 167*l.* 11*s.* 6*d.*, as well as the sum of 500*l.*, in this action; and, consequently, that a nonsuit must be entered.

Judgment of nonsuit.

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 By memorandum, dated November, 1822, A., an

**DECLARATION**, in assumpsit upon a special agreement stated, that heretofore, to wit, on 11th November, 1822, at attorney, agreed with B., for a valuable consideration, to take C., (the son of B.), into partnership, as *attornies and solicitors for ten years*, and to allow him a moiety of the profits. The memorandum did not state *when* the partnership was to commence. C. was not admitted an attorney until April, 1823, but he conducted the business in the name of

*Tarvin*, in the county of *Chester*, by a certain memorandum of agreement then and there entered into between plaintiff and defendant, plaintiff, in consideration of 250*l.* in hand paid by defendant, and 100*l.* to be paid by defendant within two years from the date thereof, did agree to take one *Thomas Jones*, the son of defendant, into partnership, as attornies and solicitors, at *Neston*, in the said county of *Chester*, and to give him, the said *T. J.*, a moiety of the profits to arise from the said partnership, and also one half of the profits to arise from the hundred court of *Win-all*, of which plaintiff was lord, also a moiety of the royalties appurtenant thereto ; the partnership to continue for ten years ; and the said memorandum of agreement being so made, afterwards, to wit, &c., mutual promises ; and plaintiff, in fact, saith, that he, relying on the said promise and undertaking of defendant, did afterwards, to wit, on &c., at, &c., aforesaid, take the said *T. J.* into partnership, as attornies and solicitors, at *N.* aforesaid, and hath always, from the time of making the said agreement, hitherto been ready and willing to allow the said *T. J.* such moiety of the profits as in the said memorandum of agreement in that behalf mentioned, whereby defendant, afterwards, to wit, on 11th *November*, 1824, at *T.* aforesaid, according to the tenor and effect of the said agreement, and of his said promise and undertaking, became liable to pay to plaintiff the 100*l.* in the said memorandum of agreement mentioned, &c. : Plea, non assumpsit, and issue thereon. . At the trial before *Warren*, C. J., at the *Chester* spring assizes,

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*A.* from *January*, 1823. In an action by *A.* against *B.* for part of the consideration money :—Held, first, that the agreement, though legal on the face of it, upon proof of *C.* not being admitted an attorney till after its execution, became illegal, within 22 *Geo.* 2, c. 46, s. 11, and void.

Second, that such proof was properly admitted, on the part of the defendant.

Third, that proof, on the part of the plaintiff, that the agreement was to be kept as an *escrow*, and not acted upon, till after *C.*'s admission, was inadmissible, and properly rejected. And,

Fourth, that if such proof could have been admitted, the declaration, which described the agreement as one to commence *in presenti*, could not be supported by *parol* evidence, that it was to commence *in futuro*, the agreement being for more than one year, and the whole of it, therefore, required to be *in writing*, by the Statute of Frauds, 29 *Car.* 2, c. 3, s. 4.



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1825, upon the production of the agreement, the consideration for the partnership was there stated to be, "250*l.* in hand paid by the said *Francis Jones* (the defendant) and 100*l.* paid by the said *F. J.*, within two years from the date hereof;" and it further appeared, upon the cross-examination of the plaintiff's witnesses, that *Thomas Jones* had not been admitted an attorney at the time when the agreement was executed, and that he conducted one branch of the business in the name of the plaintiff, from *January* to *April*, 1823, in which latter month he was first admitted an attorney; and thereupon four objections were taken on the part of the defendant: first, that the declaration stating the consideration to be "100*l.* to be paid," and the agreement stating it to be "100*l.* paid," there was a fatal variance between them; second, that an agreement to take into partnership with an attorney, a person who was not an attorney, was illegal and void by the statute 22 *Geo.* 2, c. 46, s. 11; third, that an agreement to share the profits of a hundred court was a violation of the statute 4 *Hen.* 4, c. 19; which provides, that no steward, &c., of any lord of a franchise which hath return of writs, shall be an attorney in any place within the franchise; and fourth, that the agreement was in the same respect a violation of the statute 5 and 6 *Edw.* 6, c. 16, which prohibits the buying and selling of offices; and upon all, or any of these grounds, it was contended, that this action was not maintainable. The learned judge being of opinion that the *second* objection was fatal to the plaintiff's right of action, directed a nonsuit on that ground only, without giving any opinion on the other objections; and rejected evidence on the part of the plaintiff to shew, that the agreement was not intended to be acted upon till after *Thomas Jones* was admitted an attorney, but was to have been kept as an escrow up to that time.

In *Trinity* term, 1825, a rule nisi was obtained for setting aside the nonsuit, and for a new trial.


*D. F. Jones*, who now appeared to shew cause, was stopped by the Court, who desired to hear

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*Cross*, Serjt., in support of the rule, confining himself, in the first instance, to the question of the legality, or illegality, of the contract. There is nothing illegal on the face of this contract, and the Court will not either hunt after or intend illegality. The plaintiff was, at the time when the contract was made, a regular certificated attorney, though *Thomas Jones*, at that moment certainly was not. The substance of the contract is, that the plaintiff, in consideration of a sum of money to be paid to him, will take the defendant's son into partnership with him as an attorney, when he is qualified to enter into such a partnership, and will allow him a moiety of all the profits of his business. It is, therefore, a contract made for the benefit of one who was no party to it, and is, upon the face of it, legal. The defendant was allowed to extract, upon cross-examination of the plaintiff's witnesses, parol evidence, shewing the object of the contract to be illegal; he proved that at the time when the contract was made, *Thomas Jones* was not an attorney; and it was then contended that the contract was illegal and void. It was then open to the plaintiff to give parol evidence, shewing the real intention of the contracting parties, and the legality of the contract itself; he proved that *Thomas Jones* had actually served the whole of his clerkship with an attorney, and that he was in a very short time after the date of the contract, about to be admitted an attorney, and he proposed to give evidence of other facts which would have established, beyond all doubt, that the contract was one to commence, not in præsentia, but in futuro, and was not intended to be acted upon till after *Thomas Jones* should have been admitted an attorney. Now, the latter evidence would at once have rendered the contract legal, and was, therefore, improperly rejected. The contract itself does not state *when* the term of the proposed partnership was to begin;

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therefore the plaintiff was entitled, so far, to explain it by parol evidence. [*Littledale, J.* It is quite evident from the language of the contract, looking at that alone, that the partnership was intended to commence from the date of the agreement; and the words, "from the date hereof," are not necessary to give it that operation. That is laid down by Lord Coke with reference to a lease (*a*), and the principle is equally applicable to an instrument like this]. It is not necessary that a man should be an attorney, in order to be qualified to share the profits of a hundred court. This is an agreement not under seal; and even a deed under seal, as a lease, for instance, may be explained by parol evidence, so far as to shew the real date of its commencement. But, even if this must be regarded as an agreement to commence in præsentî, where is its illegality, and against what law, written or unwritten, does it militate? [*Bayley, J.* Does it not violate the provisions of the statute 22 Geo. 2, c. 46, s. 11, which provides, that no sworn attorney or solicitor shall suffer his name to be used by an unqualified person, to enable him to practise as an attorney or solicitor; and the very object of this agreement is, that the plaintiff's name shall be used by *Thomas Jones*, an unqualified person, for his profit]. That does not appear upon the face of the agreement. [*Bayley, J.* Besides, this question necessarily involves the question of variance. The declaration describes the agreement as one to take *Thomas Jones* into partnership immediately; the evidence which it is contended ought to have been received would, according to the present argument, have shewn that it was an agreement to take him into partnership at some future time, when he should have been admitted an attorney: so that, assuming the agreement to be rendered legal by that evidence, the plaintiff is concluded by the variance, for then the declaration describes the agreement quite differently from the evidence. *Holroyd, J.* And, as this is an agreement to last for a period exceeding one

(*a*) Co. Litt. 45 *b*, 46 *b*. See *Steele v. Mart.* Ante, vol. vi. 392.

year, it must be in writing (a); whereas that part of it upon which the present argument must rest, namely, that it is to commence in futuro, is not in writing, but is supplied by parol evidence. [Bayley, J. And the whole arrangement is pregnant with mischief; for if *Thomas Jones* was to be bound to the plaintiff, as an attorney, that was giving the latter a consideration, and inducement, to make, whether true or not, such representation as will enable the former to qualify as an attorney]. This point cannot be carried further, and if the Court feel decidedly against the plaintiff upon this, it is useless to argue the other points that arise in the case.

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BAYLEY, J.—None of us entertain any doubt upon this point. Where an action is founded upon a written contract, the Court is to look to the terms of that written contract, and cannot admit parol evidence to alter their substance or effect. In this case, the declaration describes the agreement as one to commence in præsentî, and primâ facie the parties appear by the agreement to have been attorneys at the time when it was made, and to have intended that it should come into operation from that moment. This is, undoubtedly, the effect of the agreement, as it is to be collected from the language, both of the declaration, and the agreement itself. Now, it is said, *that* is not the effect of the agreement, or the intention of the parties; but that the contract was a conditional one, and to commence in futuro, namely, when one of the parties should have been admitted an attorney. When was his admission, as an attorney, to take place? That was contingent: and, therefore, though the agreement may not upon the face of it appear illegal, we are bound to look at the state of circumstances, and the situation of the parties, at the time when the agreement was made, in order to ascertain whether such an agreement could, or could not, then be legally entered into. Now, looking at the state of

(a) *Boydell v. Drummond*, 11 East, 142; 29 Car. 2, c. 3, s. 4.

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circumstances, and the situation of the parties when this contract was made, it is clearly within the 22 Geo. 2, c. 46, s. 11, and illegal. That section enacts, "that if any sworn attorney or solicitor, shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor, or permit or suffer his name to be anyways made use of upon the account, or for the profit of, any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid; every such attorney or solicitor so offending shall be struck off the roll, &c. Now, it appeared here, that from the month of *January*, 1823, *Thomas Jones*, alone, managed the business at one place, and acted as an attorney for, and in the name of the plaintiff, which was certainly illegal, for he was an unqualified person within the meaning of the section, he never having been admitted an attorney. Such conduct, if brought before the Court, might have operated to prevent his ever being admitted in futuro, and therefore might have prevented the agreement ever becoming legal: but at all events the agreement was illegal when it was made, because by the very terms of it the name of the plaintiff was to be made use of by and for the profit of *Thomas Jones*, he being an unqualified person. Then such an arrangement being illegal, the agreement upon which it is founded must be void, and will not support any action arising out of it. As to the parol evidence offered by the plaintiff, it was clearly inadmissible, and properly rejected; but even if it could have been received, it would not have assisted the plaintiff, because then there would have been a fatal variance between the agreement, as set out upon the record, and as described by the evidence. The nonsuit, therefore, was right, and this rule for setting it aside must be discharged.

HOLROYD, J.—I am entirely of the same opinion.

The nonsuit was clearly right, whatever was the real intention of the parties; but we must take their intention to have been that which appears upon the face of the agreement and the record, namely, to enter into an absolute agreement to commence in præsentî. Parol evidence, therefore, on the part of the defendant, to shew that such an agreement was illegal, was properly admissible, but could not be received on the part of the plaintiff, to vary or give a new effect to the agreement. If, however, such evidence could have been received, it would have produced a fatal variance between the declaration and the instrument declared on; and, therefore, in either view of the case, the action is not maintainable.

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LITLEDALE, J.—I also am of opinion, that the nonsuit in this case was right. The agreement may, upon the face of it, be legal; but the defendant, in answer to the action founded upon it, clearly proved by parol evidence that it was illegal, which he had a perfect right to do. The plaintiff, perhaps, was entitled to give any parol evidence he could to *explain* the agreement, and restore to it its legal character; but then he should have described it in his declaration in the same terms as he proposed to prove it by his witnesses, and that he has not done. I think the plaintiff would have been at liberty in point of law, if he could have done so in point of fact, to prove that the contract was kept as an escrow until the admission of the young man as an attorney; because then the contract would not have taken effect until that time, and could not have been made effectual by intendment, though dated before that time: as was held with respect to an award in the case of *Jennings v. Vandeputt* (a). But if he had done that, he still could not have maintained this action, because the declaration will not apply to such a construction of the agreement.

BAYLEY, J.—I omitted to state that the recent case of

(a) Cro. Car. 263.

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*In re Jaques (a)*, is an extremely similar one to the present, and is an express authority to shew, that the relative conduct of these parties was illegal within the statute 22 Geo. 2, c. 46, s. 11; and that being so, the agreement on which it was founded must of course be void.

Rule discharged.

(a) Ante vol. ii. 64.

The MAYOR, BAILIFFS, and BURGESSES of LIVERPOOL v. TOMLINSON.

Plaintiffs  
enfeoffed de-  
fendant with  
a piece of  
land bounded  
on the west  
by a street,  
and on the  
east part by  
buildings be-  
longing to  
defendant, and  
part by build-  
ings belonging  
to W. G.  
Defendant co-  
venanted  
“that he would  
not, at any  
time after the  
feoffment,  
permit or  
suffer any  
warehouse  
door to be  
opened or put  
out to the front  
of the street.”  
A warehouse  
door was put  
out in the  
buildings be-  
longing to W.  
G., at the  
eastern extre-  
mity of de-  
fendant's land, about eight feet distant from, but giving access to the street:—Held, that this was a breach of the covenant by defendant, though the premises in which the door was put out, did not stand upon his land, were not in his occupation, and were not level with the front of the street.


**COVENANT.** The declaration stated, that plaintiffs, at the time of making the indenture of feoffment hereinafter mentioned, to wit, on 21st *March*, 1820, were seised of and in the piece or parcel of land with the appurtenances in the indenture hereinafter mentioned, particularly described in their demesne as of fee, and being so seised, afterwards, to wit, on, &c., at, &c., by a certain indenture then and there made between plaintiffs of the first part, defendant of the second part, and *Martin Hammill* of the third part; one part of which, &c., (profert), for the consideration therein mentioned, did enfeoff and convey to defendant, his heirs, &c., all that piece or parcel of land situate and being on the east side of *Juggler street* in *Liverpool*; bounded on the north by ground belonging to plaintiffs, on the south by ground belonging to Messrs. *Park* and *Fletcher*, and on the east in part by buildings belonging to defendant, and in other part by buildings belonging to Mr. *William Gregson*, containing in front to *Juggler street*, and at the back severally, 67 feet 5 inches, and running in rear or depth backwards on the north side 8 feet 8 inches, and on the south side 16 feet, more or less, together with all and singular the appurtenances therein particularly mentioned.

To hold the same with the appurtenances, unto defendant, his heirs, &c., to the uses therein mentioned; and defendant for himself, his heirs, &c., did by the said indenture covenant, promise, and agree to and with plaintiffs and their successors, that defendant, his heirs, &c., should not nor would at any time or times thereafter, erect or build, or cause, permit, or suffer, to be erected or built *on the said piece or parcel of land and premises thereby granted, enfeoffed and conveyed*, any messuage or dwelling-house, coach-house, warehouse, or other building, which should exceed the height of 54 feet from the pavement of the street to the eave of the roof. And also that defendant, his heirs, &c., should not nor would at any time or times thereafter, *permit or suffer any warehouse door to be opened or put out to the front of Juggler street*. And also that no entrance into any of the cellars of the buildings to be erected *on the said piece of land and premises thereby granted, enfeoffed and conveyed*, or any steps, should project beyond 18 inches from the wall of the said buildings; as by the said indenture, amongst other things, more fully appears. By virtue of which said feoffment, defendant then and there became and was seised of and in the said piece or parcel of land with the appurtenances in his demesne as of fee. And although plaintiffs, &c., (performance by plaintiffs). Yet, protesting, &c., (non-performance by defendant), plaintiffs in fact say, that after the making of the said indenture, and while defendant was so seised as aforesaid, to wit, on 1st *January*, 1822, at, &c., aforesaid, defendant did *permit and suffer*, and from thence hitherto hath permitted and suffered, and still doth permit and suffer, a warehouse door to be opened and put out *to the front of Juggler street* aforesaid, contrary to the true intent and meaning of the said covenant in that behalf made. And so, &c. Plea, that defendant did not *permit or suffer*, nor hath he permitted or suffered, at any time since the making of the said indenture, a warehouse door to be opened or put out *to the front of Juggler street* aforesaid; and issue

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thereon. At the trial, before *Holroyd, J.*, at the *Lancashire* spring assizes, 1824, the jury found a verdict for the plaintiffs, damages one shilling, subject to the opinion of the Court upon the following case :—

The plaintiffs, being the corporation of *Liverpool*, have of late years laid out considerable sums in the purchase of houses, for the purpose as well of widening the old streets of *Liverpool*, as of laying out new streets therein, and at the time of making the feoffment stated in the declaration, were seised in fee of the piece of land described in that feoffment, and of other land lying both to the north and south thereof, the whole of which was bounded towards the east by a street formerly called *Juggler* street, but then and now *Exchange* street east. On the 21st of *March*, 1820, the feoffment set forth in the declaration was duly passed under the common seal of the said corporation, and was also duly executed by the defendant, to whom the livery of seisin was given of the said piece of land.

The plaintiffs, on the same last-mentioned day, sold and conveyed to *James Atherton*, of *Everton*, near *Liverpool*, merchant; a piece of land, situate and being on the north side of *Dale* street, and east side of *Juggler* street, bounded on the east by buildings belonging to *Mr. Henry Renshaw*; and on the north by land belonging to *Messrs. Park and Fletcher*, containing in front to *Dale* street 13 feet, and in front to *Juggler* street 190 feet; and being in breadth at the back or north side 17 feet; and containing by admeasurement 190½ square yards: and covenants similar to those set forth in the declaration in this cause were inserted in the feoffment passed under the common seal of the plaintiffs to the said *James Atherton*, to be performed by him, his heirs, executors, administrators and assigns.

The plaintiffs also, previously, and on the 8th *January*, 1820, sold and conveyed to the said *Messrs. Park and Fletcher*, a piece of land on the east side of *Juggler* street, bounded on the north by land lately sold by the plaintiffs

to the defendant, and on the south by other land lately sold by them to the said *James Atherton*, and on the east by premises belonging to Mr. *John Garnett*, containing in front to *Juggler* street, and at the back severally, 42 feet 8 inches, on the north side 16 feet, and on the south side 21 feet; and covenants similar to those set forth in the declaration in this cause were inserted in the feoffment passed under the common seal of the plaintiffs to the said Messrs. *Park* and *Fletcher*, to be performed by them, their heirs, executors, administrators and assigns.

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The defendant never erected or built any thing whatever on the piece of land so conveyed to him by the plaintiffs, as aforesaid, but in order to make a warehouse belonging to him of greater value, he put out the warehouse door mentioned in the declaration; which warehouse, at the nearest part to *Juggler* street, stood at the distance of 8 feet 8 inches from the line of the said street.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover. If so, the *postea* is to be delivered to the plaintiffs; if otherwise, to the defendant.

*Tindal*, for the plaintiffs. - The question in this case is, whether the covenant not to suffer any warehouse door to be put out to the front of *Juggler* street, is confined to buildings to be erected on the land purchased by the defendant of the plaintiffs, or extends to the buildings already erected on his own land, adjoining that so purchased. On the part of the plaintiffs it is contended, first, that by the *spirit* of the covenant, it was intended to prevent the putting out a door where the defendant has put one out; and second, that by *letter* of the covenant, he is precluded from so doing: in other words, that the covenant extends both to the land purchased by the defendant of the plaintiffs, and to his own land and buildings adjoining. The Court, will, if possible, so construe the covenant as to give full effect to the intention of the parties; and one question is, what that intention was. - The defendant covenants that

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he will not at any time after the purchase permit or suffer any warehouse door to be opened or put out *to the front of Juggler street*. In order to bring the defendant within the operation of that covenant, it is not necessary that he should open a door immediately upon and close to the line of the street; the words "in front of" do not mean close to the street; they mean merely *ex adverso*, or opposite to it; they do not imply contiguity. Dr. *Johnson*, in his Dictionary, defines the verb "to front" to mean, "to stand opposed, or over against, any place or thing," and the example he gives from *Addison* is peculiarly illustrative of the present case: viz., "the square will be one of the most beautiful in *Italy*, when this statue is erected, and a town-house built *at one end to front* the church that stands *on the other*." The language of this covenant therefore clearly shews the intention to have been, that it should extend to all the land occupied by the defendant, and the marked difference of expression adopted in the preceding and succeeding covenants, strongly corroborates that argument; for they are both, in express terms, confined *to the said piece of land conveyed by the plaintiffs to the defendant*; whereas this makes no mention of that piece of land, but speaks generally *of the front of Juggler street*.

*Parke, contra*. The defendant has been guilty of no breach of covenant. The covenants all arise out of the purchase of a particular piece of land by the defendant of the plaintiffs; they all apply to that piece of land; and they must all be construed with due attention to the enjoyment of that piece of land by the defendant. If these positions are correct, the opening the door in question was no breach of the covenant. Covenants like these are to be construed strictly; for they arise out of a conveyance in fee of land, and are introduced for the purpose of restricting the feoffee in the use and enjoyment of the land so conveyed to him. The door in question is not *to the front of Juggler street*, in the fair and ordinary sense of that

expression. *To the front of* a street means, in the actual line of frontage, on a line with the front. The language of the other covenants must be taken to pervade and govern this, and as they are both expressly limited to the piece of land which was the subject of the conveyance, and which is in the actual line or front of the street, the intention must have been, that this should have the same limitation, although the words expressive of that intention have been inadvertently omitted. But there is another objection to the plaintiffs recovering in this action. The covenant is *not to permit or suffer* certain acts to be done. Now the description of the premises in the case, and in the declaration, which is part of the case, shews, that the door in question was put out upon premises then in the occupation, not of the defendant, but of another person, Mr. Gregson. The defendant, therefore, did not permit or suffer this door to be put out within the language of the covenant, for he could not prevent its being done; and that which a man has not power to prevent, neither law nor reason can hold him to permit or suffer, because those words imply that it is done with his consent and acquiescence. The act done in this case, may, in the language of the law, be a fraud upon the covenant, or it may lead to a state of things unprovided for by the covenant; but neither one nor the other amounts to a breach of the covenant, or will support an action of which such breach is the cause. *Clifton v. Walmsley (a)*, *Collison v. Lettsom (b)*.


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*Tindal*, in reply, was stopped by the Court.

BAYLEY, J.—We must construe this deed according to the language which we find in it, without taking into consideration other transactions of a similar nature between one of these parties and third persons. The question for us to decide is, whether the covenant respecting warehouse doors


(a) 5 T. R. 564. See *Doe v. Cavan*, Id. 567.

(b) 2 Marsh 1. 6 Taunt. 224.

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applies exclusively to buildings to be erected on the piece of land conveyed to the defendant, or extends to other buildings abutting on that land. I am clearly of opinion that it extends to *all* the buildings. Generally speaking, it is the duty of the plaintiff, in a case like this, to make out plainly his own intention; but if, upon examining the deed, we can ascertain clearly what that intention was, we are bound to give effect to it. We are much aided in the construction of this deed by the description given of the premises in the declaration and the special case, and by the language of the other covenants contrasted with that upon which the question before us arises. The description of the premises shews us, that when the conveyance was made, neither the defendant, nor *Gregson*, both of whom occupied warehouses abutting upon this piece of land, had any opening or access from them to *Juggler* street; and the language of the other covenants, both of which are in express terms confined to this piece of land, differing in so important a particular from this covenant, shews us that such an omission could not have occurred accidentally, but must have been the effect of design. Then with what design could that omission have been made? The only motive to be conceived is, to prevent the owner or occupier of the warehouses already erected, from having, after the conveyance of the land, any more opening or access to the street, than they had before. The defendant covenants "not to permit or suffer *any* warehouse door to be opened or put out to the front of *Juggler* street;" which in my view of the case extends to every warehouse he might have, whether before or after the conveyance, and whether in his own occupation, or in the occupation of another. It is said, that as the warehouse in which the door was opened was not in the defendant's occupation, he could not prevent, and therefore cannot be said to have permitted, or suffered, the doing of that act. But he might have prevented it by a proper arrangement with Mr. *Gregson*, or, at least, he ought to have taken that into consideration, before he bound

himself by such a covenant. Then it is said, that "to the front" means to the actual line and level of the front of the street, and that this door being eight feet from the actual front does not come within that description. But I think it clearly does. A door opening to the front of a street, seems to me, in a fair and ordinary sense of the words, to mean, a door giving access to the street; and that whether it is close upon the street, or a few feet backwards from it, is perfectly immaterial. Now the door that has been opened, certainly gives access to the street, which it was the object of the covenant to prevent; and therefore the defendant, in suffering the door to be opened, has broken his covenant, and is liable in the present action. For these reasons, I am of opinion, that the *postea* should be delivered to the plaintiffs.

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HOLROYD, J.—I am of the same opinion. This is clearly a breach of the covenant within the letter of it, and it seems to me that it is a breach within the spirit and meaning of it also. It is an established general rule, that a covenant is to be construed most strictly against the covenantor; and it is also a rule, that a covenant like this, the effect of which is to restrict the covenantor in the use and enjoyment of his freehold, is to be construed strictly against the covenantee. But, the object of this covenant is plain, and must have been evident to both parties when they entered into it, namely, to prevent any access to the street, from any warehouse on, or abutting upon, the land conveyed; and whether such access was obtained by means of a door *in* the line or front of the street, or standing a short distance from it, could not make any difference in that object. Now that object the defendant has defeated, and therefore has been guilty of a breach of covenant, for which he must answer in the present action.

LITTLEDALE, J.—The plaintiffs are clearly entitled to recover. The language of the other covenants, contrasted with this, proves clearly that this was always intended and

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understood to apply to other subjects besides the particular piece of land conveyed by the deed ; and the intention of the parties in inserting such a covenant was evidently to prevent the very act which the defendant has done. It is equally an injury to that intention, and a breach of that covenant, whether the door is opened exactly upon the level of the street, or a few feet backwards from the front of it. Access to the street was the thing meant to be prevented, and access to the street is the thing which the defendant has effected: He has therefore committed a breach of covenant, both in the letter and the spirit of it.

Postea to the plaintiffs.

BYERLEY v. WINDUS and others.

A non-parishioner, whether extra-parochial, or residing in another parish, can have no right to a pew in the *body* of a parish church, except by prescription.

Prohibition lies to restrain the spiritual court from proceeding in a suit brought by an extra-parochial person for a pew in the *body* of a parish church; either if a pew is claimed by any other title than prescription, or if it is claimed by that title, and the prescription is denied by the defendant.

Upon motion for a prohibition, this Court is not bound to wait till the suit in the spiritual court is actually *at issue* : if the latter is clearly in progress towards the trial of a question over which it has no jurisdiction, prohibition lies forthwith.

**PROHIBITION.** The plaintiff declared, as surviving churchwarden of the parish of *Saint Andrew, Holborn*, in the city of *London* and county of *Middlesex*, against the defendants, as the *Principals* and *Ancients*, or *Grand Fellows*, of the society of *Staple Inn*. The declaration stated, in substance, as follows :—That the parish of *Saint Andrew, Holborn*, in the city of *London* and county of *Middlesex*, was an ancient parish, and that in that part which was within the city there was an ancient parish church, which had immemorially been supported and repaired by the parishioners, who had also paid the tithes and other lawful dues to the rector; that the population of the parish had long been, and still was, very large, and much larger than could be accommodated with pews and seats; and that many parishioners, desirous of attending divine service, were prevented doing so for want of that accommodation; and that

no person, whether parishioners or otherwise, ought to lock up any pews or seats; that neither the defendants, nor others, the *Principals* and *Ancients*, or *Grand Fellows*, of the society of *Staple Inn*, had had the immemorial enjoyment of any pews or seats, but, on the contrary, the churchwardens for the time being, had had the immemorial right to repair, alter, amend, renew, remove, and place all the pews and seats, as the same might be necessary. The declaration then averred, that all pleas concerning prescriptions and customs, and of titles in lands and tenements, depending on immemorial custom, were matters triable and determinable only in the courts of common law, and not in any Ecclesiastical court; yet that the defendants, as *Principals* and *Ancients* of *Staple Inn*, claiming title to certain seats and pews in the body of the church, under colour and pretence of a prescription, had drawn into plea the plaintiff, who was churchwarden, in the Spiritual court, before the Vicar-General of the Bishop of *London*, and had exhibited a libel in that court against the plaintiff as churchwarden. The declaration then proceeded to set out the libel, which stated, in substance, as follows:—That *Staple Inn* was an Inn of Chancery, extra-parochial, though surrounded on all sides by the parish of *Saint Andrew, Holborn*; that the Inn was of ancient standing, *having existed for several centuries*; that the same was owned, possessed, and inhabited, by a certain society, called or known by the name of the society of *Staple Inn*; that they had no sittings in any church or chapel, save the church of *Saint Andrew, Holborn*; that *from time immemorial*, certain pews and seats claimed by the complainers were in the body of the church, were appurtenant to the Inn, and were exclusively possessed and enjoyed by the society, with the privity, knowledge, and consent of their rector, churchwardens, and parishioners: that in, or about, the year 1688, the society, with the like knowledge of the parish, rebuilt the said pews at their own expense, and had from that time occasionally repaired

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and beautified them; that the society had been in the constant habit of attending divine service in the church; that the doors of the said pews were locked, and the keys kept by the butler of the society; that formerly the society went in procession from the Inn to the parish church, habited in their gowns, headed by the porter of the Inn with his staff, and the arms of the Inn thereon, accompanied by the butler of the Inn with the keys of the pews, and returned to the Inn with the same form, the butler locking the pews, and bringing the keys with him; that all this took place without any objection on the part of the parish; that the society had occasionally voluntarily contributed sums of money towards repairing the church and the steeple—and in support of this averment, they referred to certain entries in the books of the society, extracts from which they claimed to exhibit at the hearing of the cause in the Ecclesiastical court, but which the declaration insisted could not be evidence for the society in a court of common law. The libel then went on to state, that in, or about the year 1818, the parish officers caused the church to be repaired, and the pews in question to be removed, without the knowledge or consent of the society; and that the society, on being acquainted with the circumstance, sent a letter to the vestry clerk, expressing their surprise at the conduct of the parish officers, and demanding that the scite of the pews should not be curtailed. Several facts were then stated, shewing the communication and correspondence between the society and the parish, which terminated in the parish denying the right of the society to the pews, declining to entertain any question as to the scite for the accommodation of the society, and refusing admission to the pews, after a formal demand for that purpose made by the society. The libel then, after formally averring the jurisdiction of the Spiritual court, prayed, that the parish officers might be admonished, to permit the society to have free access to, and full enjoyment of the pews, and to refrain from disturbing

them thereafter, in that use and enjoyment. The declaration then proceeded to aver, that the parish officers appeared in the Ecclesiastical court, under protest, and prayed that the libel might be rejected; that, nevertheless, the judge of that court received it to proof; that witnesses were examined; that the plaintiff, being surviving churchwarden, was required to, and did put in his personal answer, by which he stated, that he did not know of, nor did he believe in, the immemorial possession of the pews by the society; but he admitted, that for a great number of years they might have enjoyed some of the pews; that he did not believe the pews were appurtenant to the inn, the inn claiming to be extra-parochial, and not paying any rates for the repairs of the church; that he knew nothing of the facts alleged to have taken place in the year 1688; that he did not believe the society had repaired and beautified the pews at their own expense; he admitted that the society had for a number of years occasionally attended divine service, and occupied the pews, or some of them; that the pews had been locked, but he knew not who had kept the keys; he admitted occasional voluntary contributions by the society towards the repair of the church and steeple; and to the rest of the libel, he answered only in general terms, that he knew not of the facts in question, but denied not the same any further, or otherwise, than as he had answered above. The declaration then concluded by stating, that notwithstanding this answer, and the illegality of the former proceeding, the defendants continued, after prohibition, to carry on the suit in the Ecclesiastical court. To this declaration there was a plea, stating, in substance, that the defendants had had a *possessory right* to the pews, upon an usage of 100 years; that, according to the usage of the Ecclesiastical court, such possessory right was a sufficient foundation for that court proceeding to admonish the parish officers to permit the defendants to have access to the pews; that in order for the Court so to admonish the parish officers, it was not necessary for the

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defendants to allege, or prove, an *immemorial* possessory title, as stated in the libel; that, according to the usage of the Ecclesiastical court, the denial in the plaintiff's personal answer did not put such immemorial possession in issue, nor did it form an issue whereon that court would proceed to give sentence on such immemorial possession; that no denial in that personal answer, nor in any plea in the cause, had hitherto been made of such immemorial possession, *so as to put the same in issue*; and that no issue on such immemorial possession had been, or was yet joined, in or by the personal answer or any other plea in the Spiritual court. Demurrer to the plea, and joinder in demurrer.

*Merewether*, in support of the demurrer. Two questions arise upon this plea:—first, whether it is sufficient for these defendants to plead a possessory title to the pews, without alleging an immemorial custom for the enjoyment of them; and second, whether that possessory title is or is not sufficiently put in issue by the personal answer of the plaintiff. First, these defendants cannot rely upon a possessory title; they ought to have pleaded an immemorial custom. This is a suit between churchwardens and persons who are not parishioners. If it were a suit between parishioners, each of whom would have a right to a seat in the church, the only question would be, in what part of the church of them should sit; but a suit between churchwardens and non-parishioners raises a very different question, because the churchwardens are ecclesiastical officers, and their duty it is to arrange the seats of all the parishioners. In such persons, a mere possessory title is not sufficient. The first case that bears upon this point is *Pettman v. Pettman* (a). That was a suit for the disturbance of a parishioner in an *Eastry* church, which *Pettman* claimed under his ancestors; and the prayer was for a monition to refrain in future from disturbing *Pettman* in

(a) 1 Phil. Rep. 316.

the peaceable possession of the pew. The answer to the libel stated that *Bridger* was entitled to the pew in respect of the manor-house of *Eastry Court*, and claimed it as appurtenant to the house. Sir *John Nicholl* pronounced a long and elaborate judgment on the case, some extracts from which will greatly tend to elucidate this subject. He begins thus:—"By the general law, and of common right, all pews belong to the parishioners at large, for their use and accommodation. But the distribution of seats among them rests with the ordinary. The churchwardens are the officers of the ordinary; they are to place the parishioners according to their rank and station: but they are subject to the control of the ordinary, if any complaint should be made against them. The vestry, as such, have no authority whatever on the subject. The churchwardens are not bound to follow their directions; at the same time the sense and opinion of the vestry ought to have weight with them. The general right, then, being in the parish and the ordinary, any particular rights in derogation are *stricti juris*. It is the policy of the law that few of these exclusive rights should exist, because it is the object of the law that all the inhabitants should be accommodated; and it is for the general convenience of the parish, that the occupation of pews should be altered from time to time, according to circumstances. *A possessory right is not good against the churchwardens and the ordinary*; they may displace and make new arrangements, but they ought not, without cause, to displace persons in possession. If they do, the ordinary would reinstate them. The possession will have its weight. The ordinary would give a person in possession, *ceteris paribus*, the preference over a mere stranger." That distinction applies to this case. The defendants are "mere strangers," claiming against the "sense and opinion" of the churchwardens, who have a power to say where different parishioners are to sit, and to exclude all persons who are not parishioners. As against a mere disturber, a possessory right is sufficient,

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because the very fact of possession implies the actual or virtual authority of those who have the power to grant or withhold possession. It is, therefore, for the disturber to shew that he claims under that authority, or that he has a paramount right; a right paramount to that even of the ordinary, as a faculty, or if he cannot prove a faculty, a prescription, and such immemorial usage, as will raise the presumption of a faculty. But if a prescriptive right is relied on, it must be clearly and distinctly proved. Upon this point Sir *John Nicholl* proceeds thus:—"It is a common error to suppose, that by mere occupancy pews become annexed to particular houses in country parishes; the same families may occupy the same pews for a long time; but I apprehend they will belong to the parish at large. If, however, it is shewn that the inhabitants of a particular house have repaired, that fact establishes that the burden and the benefit have gone together, and is inconsistent with the right of the parish still to claim the benefit; and it is evidence of the annexation of the pew. Thus the uniform and exclusive possession of the inhabitants of a particular messuage, connected with the burden of maintaining and repairing the seat, is evidence sufficient to establish a prescriptive title:" and he concludes his judgment in these words:—"A prescription for a seat, as annexed to a messuage, for the use of the tenants of lands belonging to the proprietors of that messuage, would be a bad prescription. *It can only be good for the inhabitants of a messuage.* If it could be extended to tenants of the lands, mere land might be held by the inhabitants of another parish, *and the pew would then be for the use of the persons not dwelling in the parish, which would be contrary to law.*" Such, therefore, being the general doctrine with respect to the rights of parishioners on the one hand, and the duties of churchwardens on the other, the effect of it is this; that, both upon principle and in the express language of that learned judge, it excludes non-parishioners from any claim to the exclusive possession of pews. Then

is possession any thing more than evidence of a right? By the common law it would clearly be no more; and as such a right at common law can be claimed only as an exclusive right, excluding the authority of the churchwardens and the ordinary, it follows that it can be claimed only by legal prescription, evidenced by possession from time immemorial; and that a possession, not immemorial, and which will not therefore be evidence to found such a prescription, can give no title to a pew at common law. For this position, *Stocks v. Booth* (a), is an express authority. It was there decided by this Court, that possession for above 60 years of a pew in a church is not sufficient title to maintain an action upon the case for disturbance in the enjoyment of it; but that the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration as appurtenant to a messuage *in the parish*. It was there contended, that "that being a possessory action, mere possession was sufficient to maintain it *against a wrong doer*;" and *Ashurst, J.*, said, that "in an action *against a wrong doer*, possession may perhaps be *prima facie* a sufficient title, and it is not necessary to set forth so strict a title *as in an action against the ordinary*: but," he added, "*a bare possession can never give a right*." Undoubtedly, there are many cases in which, as against a wrong doer, a possessory right is sufficient, and it may be safely conceded that it would be so in the present case. But upon what principle is that? That a wrong doer is not to disturb the sanctity of the church by putting a person, who is in possession, out of possession; and that, as against a wrong doer, a possessory title is evidence of possession from time immemorial, until the contrary be shewn; and if he can shew no better title in himself, the inference arising from possession remains unrefuted, and becomes evidence of a prescriptive title. But this is a very different case. Here the society can claim only by

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(a) 1 T. R. 428.

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prescription. They cannot avail themselves of a possessory title, because they are not parishioners, neither is such a title consistent with the language of this libel, which is in effect a claim by immemorial prescription. They cannot claim by succession, for they are not a corporation. They cannot claim by descent, for they are not the heirs of any ancestor. In what mode can they claim? They can claim merely as the occupiers of a tenement not within the parish; and, therefore, though in some cases the question might arise, whether a party alleging on the face of his libel both a prescriptive title and a possessory right, might abandon the former and elect to stand upon the latter only, that question cannot arise here; because there is no title in law by which this society can claim the pews but as appurtenant to a tenement. They cannot, therefore, now set up their possessory title; but if they could, the utmost they can prove is a possessory title for a limited number of years, which is contrary to the common law; for the common law, as is shewn by the case of *Stocks v Booth* (a), gives exclusive possession only to him who claims by prescription from time immemorial: and then, the principle laid down by *Blackstone*, J., in his *Commentaries* (b), applies, namely, that where the canon law and the common law differ, the former must yield, and the latter prevail. These defendants, therefore, must rely upon their title by prescription, and that is a claim which can be supported only in a court of common law. In *Hutton's* case (c), it is said, "a seat in a church by prescription is triable in the King's Bench court;" and in *Hutton v. Ayliffe* (d), the Court pronounced that "if a title be claimed in the Spiritual court to a seat in a church by prescription, it is clearly *coram non judice*." The modern and proper mode of trying a question of this nature is by an action upon the case for the disturbance; a course which was open to these parties, and which they ought to have adopted. But,

(a) 1 T. R. 428.

(b) 3 Bl. Comm. 112.

(c) Latch. 116. Noy, 78.

(d) Sir T. Hetley's Rep. 94.

assuming upon the grounds already stated, that the society cannot rely on their possessory title, but must rely upon their title by prescription, which is not triable in the Spiritual court, it is next important to look into the prescription itself, which upon examination will prove to be contrary to the common law, and bad. The seats claimed by this society are in the body of the church. Now a distinction has been taken between the aisle of a church, and the body of a church; and there are authorities which go to shew that though a man may prescribe for a seat in the aisle, he cannot prescribe for a seat in the body of a church. The cases also shew that there is good reason for this distinction. In *Pym and Gorwin's case* (a), the court of Common Pleas held, on prohibition, that one cannot prescribe for a seat in the body of the church, for such seats are disposable by the parson and churchwardens; but for a seat in the aisle, a man may prescribe, as it may be presumed that his ancestor, or the person from whom he holds the estate, whether it be a house or land, *within the parish*, had built the aisle. Shortly after that, came the case of *Brabin v. Trediman* (b), which is thus stated:—  
 “*Brabin*, in consequence of prohibition, made this application, viz., that the custom of the parish of *D.* is, that the parishioners should elect in each year two churchwardens, who were to have the repair of the seats, and make new what is wanting; and should not omit, as guardians for the time being, with twelve parishioners, to place or displace the parishioners, from or in the seats, according to their discretion, and according to their degrees and stations. When they had erected a new seat, with the assent of the twelve, *Brabin* was placed therein. The bishop of the diocese made a decree, that *Brabin* should be displaced from that seat, and that *Trediman* should have it, to him and his heirs; and if *Brabin*, or any one should disturb *Trediman*, he should be excommunicated. *Brabin* dis-

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(b) 2 Rol. Rep. 24.



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turbed *Trediman*, and the parson pronounced excommunication. *Brabin* appeals to the arches and delegates, to prohibit the execution of the same, because the custom was reasonable and proper, and also, because *Trediman was not an inhabitant of the parish.*" Prohibition was granted, upon the grounds, first, that the custom was reasonable; and second, "the decree is, that *Trediman* should have the seat to himself and his heirs; not so long as he should inhabit within the parish; so that, if he should inhabit at *York*, he was to have that seat in *D.*, which is unreasonable." Now, in principle, that case shews the prescription here to be bad. It decides that a grant of a pew to a man and his heirs is bad, because the heirship and the inhabitancy may be in different parishes, and the consequence might be that pointed out by Sir *John Nicholl*, in *Pettman v. Bridger* (a), namely, that "the pew might be for the use of a person not dwelling within the parish, which would be contrary to law." It, therefore, includes the proposition, that a non-parishioner cannot claim the exclusive possession of a seat in the church, and shews that the tenement of this society being extra-parochial, they cannot prescribe for these pews as appurtenant to it. The same doctrine was urged and recognised in the modern case of *Clifford v. Wicks* (b). That was trespass for breaking and entering part of a chancel, and it was there held, that a grant of part of a chancel, by a lay impropriator, to a man, his heirs and assigns, was not valid in law, and that the grantee could not maintain the action. Lord *Ellenborough* and *Bayley*, J., both alluded to the inconveniences which would result if such a grant were held valid, and *Abbott*, J., referred to the case of *Brabin v. Trediman* (c), and said, "It is laid down, that the ordinary cannot grant a seat in the body of the church to a man and his heirs, without annexing it to some particular messuage; and the same argument at inconvenienti


(a) 1 Phil. Rep. 316.


(b) 1 B. &amp; A. 498.

(c) 2 Rol. Rep. 24.

applies also to the case of a seat in the chancel." So here, the same argument applies also, for this would be in effect a grant of part of the church, to persons having no messuage within the parish. The society claim seven pews in the body of the church; they must necessarily form a considerable portion of the church; and, as the population of the parish is increasingly large, if the society are to retain those pews, a considerable portion of the inhabitants will thereby be prevented from having any accommodation in the church. Suppose the case of a parish, the population of which was so small, that the churchwardens permitted some of the inhabitants of another parish, the population of which was very large, to occupy seats in their church; suppose, after the lapse of many years, that the population of the first parish became so increased, as to require all the accommodation the church could afford, and the churchwardens, in consequence, desired the intruders to give up the seats they had occupied by permission, and to resign them for the use of the inhabitants. What would be their answer? Acting upon the principle of this society, they would say, "We are in possession; we have been in possession a great many years; we are entitled to keep possession; you cannot turn us out:" and the consequence would be, that part of the church would be occupied by persons not inhabitants, and not contributing to the support of the church, while persons who were inhabitants, and who did contribute to that support, would be wholly excluded from seats. Such a state of things would be equally inconsistent both with law and with justice. Again, in *Mainwaring v. Giles (a)*, it was held, that no action could be maintained for the disturbance of a pew, unless the pew was annexed to a house within the parish, and the Court there alluded to the distinction between the body and the aisle of the church. The principle of that distinction seems to be, that the body of the church is exclusively that which is, properly

(a) 5 B. &amp; A. 558.

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speaking, *the church*; and that the aisles are not, strictly speaking, part of *the church*. History shews, that in ancient times, it was common for individuals, upon their own soil, at their own expense, and for their own convenience, to build chapels at the side of churches, which were afterwards called the aisles; and in respect of them, therefore, it is both natural and just, that the heirs of such individuals, whether inhabitants of the parish, or not, should prescribe for seats or pews: but as to the body of the church, which is built and maintained at the expense of the parishioners, it is equally repugnant to reason and to law, that foreigners and strangers should be allowed accommodation to the exclusion of the inhabitants. This prescription could not be supported even by shewing a faculty; for as the faculty cannot be the ground, neither can it be the subject, of a prescription. A faculty, as has already been shewn, cannot be granted to a man and his successors; it is plain, therefore, that no prescription can be maintained upon it. In the cases cited, the faculty has been held bad, because by possibility it might, at some future period, come to be claimed by a non-parishioner; then, *à fortiori*, this prescription must be bad, for the parties claiming it are, and avow themselves to be, non-parishioners.

Secondly, the question of prescription, or no prescription, is sufficiently brought in issue by the terms of the personal answer of the plaintiff to the libel of the defendants. If the argument already advanced upon the first point is correct, this second point, indeed, can hardly arise, because this Court will look at the whole of the record to see whether the Spiritual court are proceeding regularly, and if they find them in any particular proceeding contrary to the common law, will send a prohibition. But without relying on this preliminary observation, it will appear, upon authority, that this issue is sufficiently raised. Undoubtedly, there are many cases of suits instituted in the Ecclesiastical courts, for tithes, for instance, where a

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modus has been set up, and where a prohibition has been refused, *because*, non constat that the prescription will be denied; but that class of cases differs from the present, inasmuch as tithes are so much more properly and immediately the subject of Ecclesiastical jurisdiction, than pews in a church. Upon the authorities already cited, it is not going too far to say, that a claim of prescriptive right to a seat in a church, as appurtenant to a messuage, is a question not triable in an Ecclesiastical court; for *Hutton's* case (a), and *Ayliffe v. Eaton* (b), seem to go all that length, and to point out that distinction between suits for tithes, and suits in respect of seats in churches, as arising from the fact, that in the latter, the moment a prescriptive title is claimed, the jurisdiction of the ordinary is gone, and the question becomes one of common law, triable only in common law courts: and in *Derby v. Cosens* (c), which was a case of tithes, *Ashurst, J.*, was of opinion, that though the Ecclesiastical court had an original jurisdiction over matters of tithes, yet that when a modus was pleaded, their jurisdiction was at an end; and *Buller, J.*, said, "It appears to us, that a modus was properly pleaded to the whole libel, which ousts the Ecclesiastical court of their jurisdiction: and that is the ground on which this Court will grant a prohibition." *Jacob v. Dallow* (d), will probably be relied on as opposed to this argument; but it is not in fact so, because, upon examination, it will appear that the party who applied for the prohibition there was a mere wrong doer, which will effectually distinguish that case from the present. *Salkeld* states that case thus:—"The plaintiff declared, in a prohibition, setting forth a prescriptive right in the plaintiff and those whose estate he had, &c., to a seat in the church, and that the defendants surmising a usage time out of mind, had libelled against him in the Spiritual court, and the judge had refused to allow his plea. The defendant traversed the

(a) Latch. 116. Noy, 78.

(b) Sir T. Hetley's Rep. 94.

(c) 1 T. R. 552.

(d) 2 Salk. 551. 2 Ld. Rd. 755.

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plaintiff's prescription, and pleaded his own usage; upon which there was a demurrer." Now, the plaintiff by demurring admitted the traverse of his prescription, and thereby abandoned his prescription; which was in effect admitting himself to be a wrong doer. And this seems to have been the ground of Lord *Holt's* opinion, when he said, "If the plaintiff had not a title by prescription, he ought not to disturb the possession of the defendant; and the ordinary hath conusance of such disturbance, *and may settle it according to usage and possession;*" which must mean, *against a wrong doer*, "unless there be a temporal prescriptive right hurt by their sentence: and the defendant might well sue in the Ecclesiastical court to have his possession quieted, and might admit his prescription to be tried there, as a defendant does a modus, or a pension by prescription." In Lord *Raymond's* report of the case, however, Lord *Holt* is stated to have added, "Then, in this present case, the prescription upon which the defendant libelled, is not denied by the plaintiff." In this case the Ecclesiastical court have taken upon themselves to decide upon the prescription, upon the ground disclosed by the plea, namely, that possession for 100 years is adequate evidence of a prescription for a pew, though not appurtenant to a messuage within the parish. Now that is an illegal ground; it is a ground of decision contrary to the common law: consequently, their proceedings are contrary to the common law, and a prohibition ought to go. Lord Chief Baron *Comyn* lays it down, that prohibition will be granted where a custom is alleged, and that custom is bad in law (a). Then, with respect to the issue, *French v. Trask*(b), is expressly in point to shew that there is a sufficient issue raised by the plaintiff's personal answer here. That is, indeed, precisely this case. There, a prohibition was granted on affidavit, that the defendant to a libel for tithes in kind in the Spiritual court, answered on

(a) Com. Dig. *Prescription*, T. 12.

(b) 10 East, 348.

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oath or pleaded a modus ; without its appearing that the modus was regularly pleaded below, so as to be put in issue there ; and Lord *Ellenborough* said, and the rest of the Court agreed, that there must be a prohibition, for it appeared that there was nothing to try in the Court below but the modus insisted upon in the defendant's answer. So here, there is nothing to try in the Court below but the prescription, for the defendants cannot claim in any other way than by prescription ; and if the Court below proceed to judgment, they will be giving judgment, not only on a matter without their jurisdiction, which a prescription whether good or bad is, but upon a prescription which is, in itself, utterly bad in law.

Lastly, it must not be forgotten, that the only evidence in support of the libel, consisted of entries in books kept by the defendants themselves. Such evidence may be admissible in the Ecclesiastical court, but it would be clearly inadmissible in this Court. Com. Dig. *Prescription*, T. 13 ; and, if the Court below have proceeded upon evidence improperly received, that is in itself a reason for granting a prohibition. On all, or any of these grounds, therefore, it is submitted that this plea is bad, and that a prohibition ought to go.

*Taunton*, contra. The last objection, as it may be answered in a word, is better first disposed of. The short and conclusive answer to it is, that it no where appears that the Ecclesiastical court did admit the defendants' books in evidence. It is true, that the defendants have set out in their libel certain extracts from their books, which they claim to exhibit upon the hearing of the cause ; but there is nothing to shew, that those extracts were so exhibited ; and even if they were, still they have not been exhibited to this Court, and without seeing the books, it is impossible for this Court to adjudge that their contents are not receivable in evidence.

Then, with reference to the main questions in the case,

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two propositions are submitted to the Court on the part of the defendants: first, that the proceedings below are not ripe for their interference, that they have not advanced far enough to shew any ground for this Court to stay them by prohibition; and second, that the Court below has jurisdiction over the subject-matter of the suit; and if either of these is made out, the prohibition must be refused.

Now, in the first place, the arguments urged on the other side do not apply to the present case; though, if the question had arisen out of an action on the case for disturbance, they might have applied forcibly. Look at the form of the pleadings here. The declaration sets forth the libel, which, it must be admitted, does allege, *incidentally and unnecessarily, not as the ground of title*, that from time immemorial, this society have possessed and enjoyed certain pews in this church. But what is the prayer of the libel? There is no allusion to a prescriptive title there; it is in these words:—"that the said *Nicholas Byerley* and *William Boyer*, may be admonished to permit the said principal and ancients, or grand fellows, of the society of *Staple Inn* aforesaid, to have free access to their seats or sitting places in the aforesaid seven seats or pews, marked, &c., in the said parish church of *Saint Andrew, Holborn*; and that they, the said *N. B.* and *W. B.*, and their successors, for the future refrain from disturbing the said principal, &c., in their quiet and peaceable sitting therein." Now the libel, in the preceding part of it, had described the plaintiff, and his then colleague, as the churchwardens of the parish. The prayer then is, that the churchwardens may be admonished. Admonished by whom, and in what character? By the ordinary, as his servants and officers, that they, and succeeding churchwardens, the future servants and officers of the ordinary, may refrain from disturbing the society in the peaceable enjoyment of their pews. This is the sum and substance of the prayer, and all that the Spiritual court are asked to do, therefore, is, that they, the ordinary's court, will, through the medium

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of their judge, the minister of the ordinary, admonish his servants and officers to desist from the tortious acts which had been previously complained of. [*Bayley, J.* Can the acts of the churchwardens be called tortious acts, until the right of the defendants has been proved?] Certainly; because as against a wrong doer, bare possession is right enough; and every man who disturbs him in possession, without setting up a superior title in himself, is a wrong doer. [*Bayley, J.* Has the ordinary any authority to interfere, except in favour of a parishioner?] Perhaps not; but the defendants are not non-parishioners, in that sense of the word which would bring them within that limitation. They are the occupiers of extra-parochial premises. This is not the case of the inhabitant of one parish, claiming a seat in the church of another parish; for *Staple Inn* does not even adjoin any other parish. It is surrounded on all sides by *Saint Andrew* parish; it is an insulated spot, in the very centre of that parish. If extra parochial occupiers cannot claim seats in parish churches, the consequence may be, that they cannot go to church at all, but will be utterly precluded, not only from attending divine service, but from obtaining, when necessary, the solemnization of the rites of marriage, baptism, and burial. But having seen what the libel states, it is next necessary to see what is stated in the answer to the libel. It is this:—"that *Nicholas Byerley* doth not know or believe, that from time immemorial, the pews and seats articulate, were exclusively possessed, used, had, and enjoyed, by the principal and ancients, or grand fellows, of the society of *Staple Inn*; but he admits, that for a great number of years last past, they have so possessed and enjoyed them, and some of the said pews and seats may have been for a great number of years used occasionally by the principal, &c.; but others of them have, he believes, been let by the said society, to persons not belonging to the same, for money; whether or no the said pews and seats, or any of them, were possessed or used, had or enjoyed, by the said



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society, with the privity, knowledge, and consent of the rector, churchwardens, and parishioners of the articulate parish of *Saint Andrew, Holborn*, he knows not, and has no sufficient means of forming a belief, or disbelief; thereon." Now, that contains any thing but a direct and positive denial of the article of the libel. "He does not know or believe—he knows not—he has no sufficient means of forming a belief, or disbelief." Surely, no one of these expressions amounts to a denial. [*Bayley, J.* Does not the concluding sentence amount to a denial?] Clearly not; it goes no further than what has already been stated; it is this:—"further and otherwise, except as he has before stated in this his personal answer, he does not admit, but denies the said position or article to be true." This, coming after the qualified and undecisive expressions that precede it, cannot be called a general and unqualified denial of the libel. Then, what is the plea? The language of that plea is extremely important for the consideration of the Court; for, after setting forth the prayer of the libel, it alleges positively and substantively, that the defendants have a possessory right to the use and enjoyment of the said seats and pews in the said libel and declaration mentioned, grounded on an usage of divers, to wit, 100 years; and this the plaintiff does not traverse or deny, but demurs to the whole of the plea; confessing, therefore, that the defendants have that possessory right. The defendant's right, then, is confessed, upon the record. [*Bayley, J.* Confessed, *if well pleaded*]. At least, it is not traversed or denied, which it ought to have been. The plea then goes on to allege, that according to the usage of the Ecclesiastical court, such possessory right is a sufficient foundation for that court proceeding to admonish the churchwardens, to permit the defendants to have access to the pews; that in order for that court so to admonish the churchwardens, it is not necessary for the defendants to allege or prove an immemorial possessory title, as stated in the libel; and that according to the usage of that court,

the denial in the plaintiff's personal answer, does not put such immemorial possession in issue, nor has any denial hitherto been made thereof, so as to put the same in issue. [*Holroyd, J.* Are not those allegations of law, instead of fact, and is not the plea bad, and demurrable in that point of view? *Bayley, J.* And is the usage according to which the plea alleges, that the Spiritual court may proceed to monition, a legal and valid usage?] They are clearly allegations of fact, and not of law; and the usage referred to is as clearly good in law. Until issue is joined in the Court below, this Court never interposes the writ of prohibition; and whether, or when, issue is joined, depends upon the usage and practice of the Court below. That must be a question of fact, and therefore the allegation that issue is not joined, is an allegation of fact; and as the demurrer must be taken to admit the truth of the plea, the result is a confession that issue has not been joined, and it follows, that this Court cannot yet interfere. Now the practice of the Ecclesiastical courts is thus laid down in *Oughton's Ordo Judiciorum* (a), a book of authority on the subject. He says, "after a libel is put in, the plaintiff in such libel may, if he please, appeal to the conscience of the defendant as to the matters suggested in the libel, and put him on his oath. Where that course of proceedings is adopted, the proceedings are like a bill and answer in equity; the personal answer is the same as the answer to a bill filed in the court of Equity; but issue (technically called such) is only joined by affirmative or negative issues as they are called there; the negative issue there answering to our general issue." Now no plea has been put in to the libel here; there is nothing more than the personal answer. [*Bayley, J.* But is your plea properly framed as a denial of issue being joined? It does not allege that *no* issue has been joined: it ought to have stated that the personal answer was insufficient, according to the usage of the Spiritual court, 'to raise *any* issue at all]. It states, that no

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(a) Vol. ii, tit. 61, 62.

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issue is joined upon the immemorial possession, and that is enough to bar the present interference of the Court, because that is the objectionable issue. It was decided in *Johnson v. Oldham* (a), that until an objectionable custom, that is, a custom which may be matter of objection, is pleaded, this Court will not interfere. There, *Lutwyche* moved for a prohibition to the Spiritual court, to stay a suit therein for a mortuary, upon a suggestion of 21 *Hen. 8*, c. 6, and that there was no custom here for the payment of it. (That statute was intended to suppress the taxation of money by the clergy for superstitious purposes, and enacts, that no mortuary shall be payable unless there is a special custom for it in the particular parish). He objected, that the custom being denied here, they ought not to proceed in the Spiritual court, and he cited *Hinde v. The Bishop of Chester* (b). It was argued contra, that the 21 *Hen. 8*, had saved the jurisdiction to the Spiritual court, where mortuaries have been usually paid; besides, that they ought to plead, that there was no such custom in the Spiritual court, and then, upon refusal there to admit the plea, to move this Court, but not before such refusal. And *per Holt, C. J.*, a prohibition cannot be granted, without a denying of the custom in the Spiritual court, which is not done here. And the whole Court seemed to be against the prohibition. And a rule was made to hear counsel on both sides. And afterwards the rule was discharged by *Turton* and *Gould, Js.*, *absente Holt, C. J.* Now that is a direct authority to shew that until the custom which is to support the objection is pleaded, this Court will not interfere. In *Dyke v. Brown* (c), the defendant libelled in the Spiritual court for the tithes of faggots made of croppings of trees, and the suggestion for a prohibition was, that the croppings were cut from the stumps of timber trees above the growth of twenty years. It was alleged that sentence was given

(a) 1 *Ld. Ray.* 609.(b) *Cro. Car.* 237.(c) 2 *Ld. Ray.* 835.

in the Spiritual court, and therefore that the plaintiff came too late for a prohibition. "But," *per Holt*, C. J., "the sentence will not hinder the having a prohibition in any case, but in case of prohibitions grounded on 23 *Hen.* 8, c. 9, for citing out of the diocese. But because the plaintiff had not pleaded this matter in the Spiritual court, they denied the prohibition; because the Spiritual court has general jurisdiction of tithes; and if any special matter deprives them of their jurisdiction, it must be pleaded there; and if it had been pleaded there, and issue joined upon it, and upon the trial it had been found to be *sylva cædua*, it had been well; but if they had refused to admit the plea, a prohibition should have been granted." In *Stone v. Harwood* (a), in prohibition, the libel was for tithes due from the occupier of the land, and the suggestion was that the land belonged to the *Abbot of Westminster*, and was held tithe free, and came into the hands of the Crown, under whom the plaintiff held as tenant at will. It was admitted that this was not pleaded below; but a prohibition was prayed on the ground that the plea could not be tried there, and that a traverse that such plea had been refused would be a bad traverse, as was held in *The Bishop of Winchester's* case (b), and therefore there was no occasion to plead it below. But, *per Curiam*, "this is but the case of every modus; for though the Spiritual court cannot try the modus, yet it must be pleaded there before you can have a prohibition; and it is not said in *The Bishop of Winchester's* case, that it need not be pleaded. It is the course of the Court, that it must be pleaded, before you can have a prohibition." *Boughton v. Hustler* (c), was a suit in the Spiritual court for tithes of loppings of trees. The defendant, by his *answer* in that Court, had alleged that the trees were above twenty years' growth, and therefore not titheable; after which he moved in this Court for a prohibition, suggesting the

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(a) Cas. tem. Hard. 342.

(b) 2 Rep. 45, a.

(c) 2 Gwill. 951.

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matter contained in his *answer* in the Spiritual court, with an affidavit of the truth of it. This Court refused a prohibition; for the party should have *pleaded* this matter in the Spiritual court, and have produced an affidavit that the Court had refused to receive such plea. There the defendant below had put in his personal answer, and therefore that case is extremely important, as shewing the validity of the distinction already suggested between a *personal answer* and a *plea*. In *Dutens v. Robson (a)*, which was a motion for a prohibition to the Consistory court of the Bishop of *Durham*, the ground of the motion was, that the libel stated an immemorial custom and prescription for the rector to receive from the parishioners a composition for the tithe of milk. This, it was urged, being matter of common law cognizance, was improper to be discussed in an Ecclesiastical court; and, as it appeared on the face of the libel, afforded good ground for a prohibition. But, as the defendant had not in his plea denied the custom, the Court refused to grant the prohibition, and said, that as the subject matter was within the jurisdiction of the Ecclesiastical court, a prohibition would not lie, unless that Court were proceeding to *try* the question of custom; but in that case, as the custom was not denied, it could not be put in issue. The rule, then, is, that if the Spiritual court have a general jurisdiction over the subject matter of the suit, this Court will not grant a prohibition in a case where a question of custom arises, unless the custom has been pleaded, and that plea refused, or has been put in issue, in the Court below. Now, that the Spiritual court have a general jurisdiction over the subject matter of this suit cannot be disputed; and the cases shew that they have an exclusive jurisdiction over it also, except only where the right claimed is founded on a prescription, or a faculty. Those cases will be found collected, and that position clearly established, in *Watson's Clergyman's Law*, c. 39; *Ayliffe's Jura Canonica*, p.

(a) H. Bl. 100.

484; *Burn's Eccl. Law*, tit. *Church*, III, IV, VII; *Id.* tit. *Prohibition*; and 3 *Inst.* 202. It is said, there is a distinction between suits for tithes, and suits in respect of pews, and that the Spiritual courts have a more confined and limited jurisdiction in the latter, than the former. The case of *May v. Gilbert* (a) is a complete answer to that argument. [*Bayley*, J. It did not appear there, whether the prescription was in issue in the Court below, or not; nor, whether the plaintiff was a parishioner, or not]. No; but "a prohibition to the Ecclesiastical court having been sued for, upon surmise of a title by prescription to a seat in the common part of the church, all the justices are said to answer, that for the title, they were not there to meddle with it, this being for a seat in the church; and again, being further pressed in the matter, all of them said, that they would not meddle with the deciding of such controversies for seats in the church, but would leave the same to them to whom it more properly belonged" (b). *Greaves v. The Rector of Hornsey* (c), is to the same point, and the observations of Lord *Stowell* there establish the same principle. In *Jacob v. Dallow* (d), the whole title was founded in prescription, and there Lord *Holt* said, "a man may sue, if he pleases, upon his prescription, in the Ecclesiastical court, to have his possession quieted, (as for a seat in the church, which was the present case), which the ordinary ought to do, upon the foundation of his usage to have sat there; for one may sue upon a prescription in the Spiritual court, if it be not denied, as upon a *modus decimandi*; or for a pension due by prescription, and the Spiritual court will give judgment upon it." The defendants are not bound in this stage of the proceedings to support their title: that is for the Ecclesiastical court to judge of: and this Court will not interfere to prevent them from so doing. *Davis v. Master* (e).

(a) 2 Bulstr. 140.

(b) Watson's C. L. 390, citing *May v. Gilbert*.

(c) 1 Haggard's Rep. 194.


(d) 2 Ld. Ray. 755. 2 Salk 551.

(e) Forest Exch. Rep. 14.

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is an authority to shew that a person living out of the parish may have a right to a seat in the *aisle* of a parish church; and, yet, upon what principle should a non-parishioner have a better right as respects the *aisle*, than the *body* of the church? The same reason that bars his right to a seat in the one, namely, the exclusion of persons who are parishioners, would equally bar it in both, for the same effect would be produced, in whatever part of the church he might be seated. The churchwardens in this case are wrongdoers, and against a wrongdoer bare possession is a sufficient title: *Barter v. Bateman* (a), *Ashly v. Freckleton* (b), *Kenrick v. Taylor* (c), and *Cross v. Salter* (d). Here, the possession of the defendants is admitted, not only by the demurrer, but by the personal answer; therefore in the Court below there is no title in question, no right in litigation, nothing to join issue upon. It was not necessary for the defendants to prove any title beyond bare possession, in order to induce the Court below to accede to the prayer of the libel, for the fact of bare possession gave them jurisdiction to do that: and if the case was thus brought within their jurisdiction at all, it was equally within their jurisdiction to decide whether a non-parishioner could, or could not, of right maintain that possession. Now that question they have already decided in favour of the defendants, because the libel which claimed that possession was excepted to by the plaintiff, argued on both sides, and admitted by the Court: and their judgment on that occasion proceeded upon the sound and sensible distinction already noticed, between an extra-parochial person, and a person inhabiting another parish; the Court being satisfied that with respect to the former they had jurisdiction, though with respect to the latter they perhaps had not. Then, what are the other cases cited on the other side? *Brabin v. Trediman* (e) does not

(a) 1 Sid. 88.

(b) 3 Lev. 73.

(c) 1 Wilson, 326.

(d) 3 T. R. 639.

(e) 2 Roll. Rep. 24.

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apply, because that was the case of a faculty. Nor is *Stocks v. Booth* (a) in point, for that was a mere question of evidence. *Clifford v. Wick* (b) is equally inapplicable, for there the claim was to part of the chancel. The only case at all in point is that of *French v. Trask* (c), and that was a suit for tithes, in which a modus was *in issue*; and upon that ground, and that only, a prohibition was awarded. For both these reasons, therefore, first, that there being *nothing in issue* here, the case is not ripe for the interference of this Court; and second, that the Court below have jurisdiction over the subject matter of the suit; it is submitted that there is no ground for a prohibition, and that the defendants are entitled to judgment.

*Merewether*, in reply. The attempt to distinguish an extra-parochial person from a non-parishioner, with reference to a question like this, is unavailing. The objection to the defendants is, that they do not live *in this parish*; whether they live in any other parish, or in no parish at all, is perfectly immaterial: the objection is the same, because the exclusion of parishioners occasioned by their admission to the pews, is the same. [*Bayley*, J. May not the question, whether their admission does occasion the exclusion of parishioners, be a question for the Spiritual court to decide?] No; because such a question cannot legally be raised; they cannot by law be allowed to exclude parishioners. But if that question could be discussed, the answer to it must be, that they do, and long have excluded parishioners; and if so, their possession has been illegal, and cannot form the basis of a prescriptive right. The attempt to raise from the plea and the demurrer to it, the inference that the possessory right of the defendants is admitted and confessed, is equally unavailing; because the question is, not what is the effect of the demurrer, but whether the plea is good in law: and it is perfectly clear that it is bad in law, because it con-

(a) 1 T. R. 428.

(b) 1 B. &amp; A. 498.

(c) 10 East, 348.



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tains allegations of law, and not allegations of fact. No case has been, or can be produced, in which the possessory title of a non-parishioner to a pew in a parish church has been allowed; for the observations of Lord Stowell, in *Greaves v. The Rector of Hornsey* (a), clearly apply to persons who were parishioners. *French v. Trask* (b), is not distinguishable in principle from the present case, and must decide it. The cases cited on the other side are all distinguishable from this. In *Dyke v. Brown* (c), *Stone v. Harwood* (d), and *Dutens v. Robson* (e), there was no personal answer; so that there could be nothing in issue there. *Johnson v. Oldham* (f), was a suit for a mortuary, and a perfectly different case from this. But, giving the utmost effect to all these cases, the principle which they establish is this, and this only; that where the right, or that out of which it springs, is admitted, or not denied, the Spiritual court have jurisdiction to proceed; which has no reference to this case, because here the title of the defendants, whether by prescription or possession, is denied in toto, and is *in issue*. *Cross v. Salter* (g), and the other cases of disturbance by a wrongdoer, may also be admitted to their fullest extent; they do not touch this case: the distinction between them is, that they were all questions of right between fellow parishioners, whereas this is a question between the ordinary and non-parishioners, who can have no right at all. Nothing has been said to defeat the arguments before urged in favour of the plaintiff; and relying, therefore, upon them, it is still contended that the demurrer in this case must be allowed, and a prohibition ordered.

The case was argued upon two former days during these sittings, when the Court took time for consideration. Judgment was now delivered by

(a) 1 Haggard's Rep. 194.

(b) 10 East, 348.

(c) Ld. Ray. 835.

(d) Rep. temp. Hardw. 357.

(e) 1 H. Bl. 100.

(f) 1 Ld. Ray. 609.

(g) 3 T. R. 639.

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BAYLEY, J., who, after stating the nature of the action, and the substance of the pleadings, thus proceeded. This then, was a suit instituted in the Spiritual court in respect of certain pews, situate in the body of the church of *Saint Andrew, Holborn*, by certain non-parishioners who claimed the exclusive right to those pews. The libel did not pray for a faculty *ex gratiâ*, but for a monition *de jure*; and it complained of a disturbance of the enjoyment of the pews, not by the present plaintiff only, but partly by him, partly by his deceased colleague, and partly by their predecessors, as churchwardens of the parish. The claim to the pews was founded, partly on prescription, and partly on possession; and the first question for our decision was, whether a possessory right to the pews could exist in these parties, independently of a prescription, or immemorial custom, to enjoy them. Now, these parties are non-parishioners, and it is perfectly clear that a non-parishioner can have no right to a pew in the body of a church, except by prescription. There is no doubt about that in point of law, and it is strictly accordant to justice; for, as the non-parishioner contributes nothing towards either the repair of the church, or the support of the minister, it would be extremely unreasonable that he should have accommodation to the exclusion of those who do contribute to both. The body of the church belongs to the parish and the parishioners at large, and the ordinary has no power to dispose of seats there to persons who do not reside in the parish. It is upon the same principle that it has been held that a faculty of a pew to a man and his heirs is bad, because by those means the pew may in time come to belong to an individual who is not a parishioner. There are many authorities, both ancient and modern, upon this point. In *Coke Littleton*, 121 b, it is said, "neither can a nobleman, esquire, &c., claim a seat in a church by prescription, as appendant or belonging to land, but to a house, for that such a seat belongeth to the house in respect of the inhabitancy

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thereof." In *Gibson's Codex*, tit. 9, c. 4, *a*, under the head of "Rules of Common Law concerning the repairing and ordering of seats," it is said, "of common right the soil and freehold of the church is the parson's; the use of the body of the church, and the repair of it, common to the parishioners; and the disposing of the seats therein is the right of the ordinary; and, generally, where the parishioners repair, the ordinary shall dispose. These heads are every where laid down in the cases on this subject, and have never been disputed." And though *Gibson* only says that the disposing of the seats is the right of the ordinary, and does not say to whom they are to be disposed, there are other authorities that do. In *Fuller v. Lane* (*a*), Sir John Nicholl lays down the general law upon this subject very fully and correctly. "By the general law, and of common right," he says, "all the pews in a parish church are the common property of the parish: they are for the use, *in common*, of the parishioners, who are *all* entitled to be seated, orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens, as the officers, and subject to the control of the ordinary. Neither the minister, nor the vestry, have any right whatever to interfere with the churchwardens, in seating and arranging the parishioners, as often erroneously supposed: at the same time, the advice of the minister, and even sometimes the opinions and wishes of the vestry may be justly invoked by the churchwardens; and, to a certain extent, may be reasonably deferred to, in this matter. The general duty of the churchwardens is to look to the general accommodation of the parish, consulting, as far as may be, that of *all* its inhabitants. The parishioners, indeed, have a claim to be seated, according to their rank and station; but the churchwardens are not, in providing for this, to overlook the claims of *all* the parishioners to be

(a) 2 Addams' Eccl. Rep. 419.


seated, if sittings can be afforded them. Accordingly, they are bound, in particular, not to accommodate the higher classes, beyond their real wants, to the exclusion of their poorer neighbours; who are equally entitled to accommodation with the rest, though they are not entitled to equal accommodation; supposing the seats to be not all equally convenient. Such, then, are the *general* duties of churchwardens, in seating and arranging the parishioners in their several parish churches. But the actual exercise of their office, in this particular, is too frequently interfered with, by *faculties*, appropriating certain pews to certain individuals, in different forms, and with different limitations; and by the *prescriptive rights* to pews of which these faculties have been the occasion. Faculties of this description have, certainly, been granted, in former times, with too great facility; and by no means, with due consideration and foresight. The appropriation has, sometimes, been, to a man and his family, ‘*so long as they continue inhabitants of a certain house in the parish.*’ The more modern form is, to a man and his family, ‘*so long as they continue inhabitants of the parish,*’ generally. The first of these is, perhaps, the least objectionable form. It is unlikely that a family continuing in the occupation of the same house in the parish, shall be in circumstances to render its occupation of the same pew in the church very objectionable. The objection which applies to the other class of faculties is, that *they* often entitle parishioners to the *exclusive* occupancy of pews, of which they themselves are no longer in circumstances to be *suitable* occupants at all, whatever their ancestors might have been. A third sort of faculty, not unusual after churches had been new pewed, either wholly or in part, appears to have been, a faculty for the appropriation of certain pews to certain messuages or farm-houses; the probable origin (the faculties themselves being lost) of most of those *prescriptive rights* to particular pews, recognised, as such, at common law. The parties must shew the annexation of the pews

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to the messuages, *time out of mind*: and the reparation, from time to time, of the particular pews, by the tenants of such houses or messuages, in order to make out their prescriptive titles. Some instances there are, too, of faculties *at large*; that is, appropriating pews to persons, and their families, without any condition annexed of residence in the parish. But such faculties are, so far at least, merely void, that no faculty is deemed, either here, or at common law, good, to the extent of entitling any person who is a non-parishioner to a *seat* even, in the *body* of the church. As to an aisle, or chancel, that, indeed, *may* belong to a non-parishioner; for the case of an aisle, or chancel, depends upon, and is governed by, other considerations. But, whenever the occupant of a pew in the *body* of the church ceases to be a parishioner, his right to the pew, howsoever founded, and how valid soever during his continuance in the parish, at once ceases and determines; though the contrary is very often supposed; as, for instance, that he may sell, or assign it, or let it to rent, as part and parcel of his *property* in the parish. So again, of pews annexed by prescription to certain messuages, it is often erroneously conceived that the right to the pew may be severed from the occupancy of the messuage: it is no such thing; it cannot be severed; it passes with the messuage; the tenant of which, for the time being, has also *de jure*, for the time being, the prescriptive right to the pew. The result, upon the whole, however, of these faculties, is, that in many churches, the parishioners at large are deprived, in a great degree, of suitable accommodation, by means of exclusive rights to pews, either *actually* vested in particular families, by faculty or prescription, or, at least, and which is the same as to any practical result, *supposed to be* so vested. I add this last, because in very many instances, these exclusive rights are merely suppositions; and would turn out, upon investigation, to be no rights at all. In this very case, for instance, there are two claims as of right set up to this identical pew, neither of

which, it now seems, is legally valid ; I mean *Kelsey's* asserted *prescriptive* right, and that of Mr. *Lane*, derived *through* the *Farrington's* ; whose right itself was a mere *possessory* right, that actually ceased and determined upon Mr. *James Farrington* ceasing to be a parishioner in 1821." The same principles are laid down by the same learned judge, in the case of *Pettman v. Bridger* (a), cited in argument, by Lord *Stowell*, in the case of *Greaves v. The Rector of Hornsey* (b), and I have quoted them thus at length, because they appear to me to be completely illustrative and decisive of the present case. Then, as the law stands thus with respect to non-parishioners, is there any real distinction between a non-parishioner and an extra-parochial person ? We are of opinion that there is none ; that both possessing the same advantage, namely exemption from all liabilities to contribution in respect of the expenses of the church, ought to share the same disadvantage, namely, the not being entitled, as matter of exclusive right, to accommodation in the church. We are, therefore, of opinion, that these defendants have no right to the pews they claim, except it be by prescription, and then the second question is, whether the proceedings in the Court below are arrived at such a stage that we can interfere to prevent that tribunal from trying a question over which they have no jurisdiction, namely, a question of prescription. Now, looking at the decisions in *Jacob v. Dallow*, (c), *Darby v. Cosens* (d), and *French v. Trask* (e), they amount in their result to this : that a court of common law is not bound to wait until the suit is actually *at issue* in the Spiritual court ; but that where we clearly see that the Spiritual court is fairly in progress towards the trial of a question over which they have not jurisdiction, we are at liberty to interfere by writ of prohibition, and remove

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(a) 1 Phill. Rep. 316.

(b) 1 Haggard's Rep. 194. See Id. 314, 319, 321.

(c) 2 Salk. 551. 2 Ld. Ray. 755.


(d) 1 T. R. 552.

(e) 10 East, 348.

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the cause before the proper tribunal. Upon that principle, we think, that a prohibition ought to be awarded in the present case. The plea of these defendants, certainly, does state, that according to the usage of the Ecclesiastical court, a possessory right is a sufficient foundation for that Court proceeding to admonish the plaintiff to permit the defendants to have access to the pews ; and that in order for the Court so to admonish the plaintiff, it is not necessary for the defendants to allege or prove an *immemorial* possessory title. That may be, and indeed is, all true ; but it is not the whole truth ; and I cannot help remarking that the plea appears to have been artfully framed in this respect for the purpose of imposing upon our supposed ignorance of the practice of the Spiritual court. I have, however, inquired of the proper quarter respecting the usage of that Court, and I find it to be this. Neither the personal answer, or the plea, ever puts in issue any of the facts in the libel ; they are put in issue, or admitted, by a previous step : a negative, or an affirmative issue ; the negative issue denying what the libel states, the affirmative issue admitting it. The personal answer is one of the consequences of a negative issue, and is required, at the instance of the plaintiff below, to supply him with proof of what is previously put in question by the negative issue. A plea is a statement of new matter. Therefore, in this case, the defendants might with truth and safety allege in their plea, that the immemorial usage was not put in issue either by the personal answer or by any plea below ; but they could not with truth have alleged that it was not put in issue at all, for it must have been put in issue by a previous negative issue. So, their other allegation, that according to the usage and practice of the Spiritual court, they were not required upon the libel to prove the prescription set up in their plea, is equally true ; but it is as uncandid as the other, for it makes parcel of the prescription that which is in law no part of it, namely, the privity, knowledge, and consent of the parish to the

exclusive enjoyment of the pews by the society. If the pews were from time immemorial appurtenant to the Inn, and the society from time immemorial had the exclusive enjoyment of them, their right would be the same, whether they knew of that exclusive enjoyment, and consented to it, or not. It is therefore perfectly true, that according to the usage and practice of the Spiritual court, the society were not required to prove the prescription with the knowledge and consent of the parish as parcel of it, because they would not be required so to prove it by the usage and practice of any court in the kingdom. These appear to me to be the answers to which the defendants' pleadings, and the arguments adduced in support of them, are open; and for the reasons already stated, we are of opinion (my brother *Holroyd* and myself, before whom only the case was argued) that the judgment of the Court must be for the plaintiff.

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Judgment for the plaintiff.

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THIS was a rule calling upon the defendant to shew cause why a writ of procedendo should not issue to the mayor, aldermen, and sheriffs of the city of *London* to proceed in this cause. It was an action of debt to recover the penalty of 5*l.*, alleged to have been forfeited by the defendant for exercising the trade of a pewterer within the city of *London*, he not being free of the Pewterers' Company. The action was originally brought in the mayor's court of *London*, and removed from thence into this Court by the defendant by writ of habeas corpus cum causâ, to which the following return was made. That the city of *London* is an ancient city; that there is a custom

A bye law, that no person not being free of the Pewterers' Company shall exercise the trade of a pewterer within the city of *London*, is a bye law in restraint of trade, and is void, without proof of a special custom to support it.

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in the city, that if any custom is hard or defective, or any thing newly arising should need amendment, the mayor and aldermen, with the consent of the commonalty, should ordain fit remedy; so as such ordinances be consonant to good faith and reason, and in nowise prejudicial to the king or his people, nor in any manner repugnant or contrary to the laws and statutes of *England*; that the customs of *London* are confirmed by statute 7 *Hen. 2*; that in a common council held 29th *July*, 1774, the lord mayor, aldermen, and common council, ordained, "That whereas the master, wardens, and commonalty of the mystery of pewterers of *London*, are and have been by divers ancient charters or royal letters patent established and incorporated a company, and now are a company by the name, &c., and have enjoyed sundry privileges and immunities. And whereas by an act passed 4 *Hen. 8*, entitled, "An act made for pewterers and true weights and beams," the mayor of *London* and the master and wardens of the said craft of pewterers for the time being are to have search of all deceivable metal or workmanship of tin or pewter, within the city and suburbs, wheresoever it be made within this realm, or without, and brought to be sold therein; And whereas all persons using the trade of a pewterer within the city and liberties, ought to be of the said company of pewterers, and it hath never been known that any person hath followed the said trade within the said city and liberties, unless he was a member of the said company, until of late persons being freemen of *London* have exercised the same and bound apprentices, whereby such apprentices may become free of other companies, by means whereof the trade carried on by such persons will not be immediately under the care and inspection of the said company of pewterers, nor will the said company be able to rectify abuses or frauds committed in the workmanship of pewter, &c. For remedy whereof be it enacted, ordained, and established, that every person, not being already free of this city, exercising the trade of

a pewterer within the city or liberties, shall be made a free-man of the company of pewterers; and that no person exercising the said trade shall be admitted by the chamberlain of the city into the freedom of any other company, and that if any person shall exercise the trade of a pewterer within the city or liberties, not being free of the said company of pewterers, he shall forfeit 5*l.*;" that such ordinance was still in full force and effect, and that defendant was taken in an action brought against him in the mayor's court of *London*, for infringing this bye law. Upon this return a rule for a procedendo, on behalf of the plaintiff, had been obtained.

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G. Bernard shewed cause. This is a bye law in restraint of trade. As such it is void, without a special custom to support it. No such custom is set out in this return. Consequently the return is bad; it furnishes no answer to the writ of habeas corpus: and forms no ground for the application for the procedendo. For all these positions, *Harrison v. Godman* (*a*), is a clear, direct, and decisive authority. (Here the Court stopped him).


Bolland and *C. E. Law*, contra. The return is good. This is a bye law, not in restraint, but for the regulation of trade; and therefore it is valid, without any special custom to support it. *Wannell's case* (*b*), *Rex v. Harrison* (*c*), and *Hesketh v. Bradock* (*d*). But, even if it were necessary in this case to set out a custom in support of the bye law, that has in effect been done; for the return does set forth an act of parliament, the 4 *Hen.* 8, which was passed before the bye law was made, and which is the foundation of, and authority for the bye law, and which refers to, and proves the existence of, a custom for making the bye law. [*Holroyd*, J. But you have not set out the

(*a*) 1 Burr. 12.

(*c*) 3 Burr. 1322.

(*b*) 1 Str. 675.

(*d*) 3 Burr. 1847.

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act of parliament; you have only recited it: we cannot, therefore, take judicial notice of it, for it is not a public act. *Bayley, J.* It is clearly not a public act, it is a mere local act, authorising the corporation of *London* to inspect all manufactured articles of pewter within the city]. The authority given by the act is to inspect all manufactured articles of pewter *wherever manufactured*, when brought within the city of *London*. The object and application of the act, therefore, is public, for it affects a particular branch of manufacture in whatever part of the kingdom carried on; such an act seems in the proper sense of the word to be a public act: and if so, its recital in this return is sufficient to call upon the Court to take judicial notice of it as a public act. Besides, this return is good upon authority. In *Waganor's* case^(a), it was resolved, that a custom that no person not free of the city of *London*, should keep a shop for the sale of wares within the city, and a bye law founded thereon, were good: and yet the return in that case went no further than the present, and was, indeed, almost exactly like it. The bye law there was, at least as much in restraint of trade as the present, and the return which supported it only by reciting a general custom to make bye laws, and a general act to enable and preserve that custom, was held to be proper and sufficient. But, lastly, the cause of action here does not exceed the sum of 5*l.*; therefore the case is within the provisions of the 21 *Jac.* 1, c. 23, and the proceedings cannot be removed from the inferior court. [*Bayley J.* It may be doubted whether that statute applies to a case exactly like the present. *Holroyd, J.* And if it does, you do not want our interference to award a procedendo, because you may proceed in the court below as if no writ of habeas corpus had been granted]. The strong authority in support of this return is *Waganor's* case, and relying upon that, it is submitted that the return is good, and that a procedendo ought to issue.

(a) 8 Rep. 121.

BAYLEY, J.—The short answer to the argument raised upon the 4 *Hen.* 8, is, that that is not a general public act, but applies only to one particular branch of trade, in respect of which it empowers the corporation of *London* to search for and examine certain manufactured articles within the city. That statute does not at all affect the question, whether every person trading in pewter within the city of *London*, must or must not be a member of the company of pewterers; it has therefore no bearing upon the present case. The distinction upon which all the decisions for and against bye laws like the present, namely, bye laws made in restraint of trade, have been founded, is this; that such a bye law, made in aid of a special custom, may be supported, but without a special custom cannot. That is clearly laid down in the case of *Harrison v. Godman*, and was the ground upon which the judgment of the Court proceeded. Lord *Mansfield* there said: “This bye law is a restraint upon trade; it is founded upon the *general* power of making bye laws in the city of *London*. Now under a *general* power to make bye laws, it is certain that a bye law cannot be made to restrain trade. As this power to make bye laws to restrain trade is not set out, we cannot presume it. We cannot take judicial notice of any *particular* custom supporting such a bye law, when no such particular custom is set out.” And *Denison, J.*, “Concurred, that the Court could not take judicial notice of any such particular custom to warrant this bye law without its being set out.” It is unnecessary to go through the other cases in which the same distinction is recognised. The law laid down in *Harrison v. Godman* is clear and good law, and acting upon that authority, I am bound to say that this bye law being in restraint of trade, and no special custom being set out in support of it, is bad, and consequently that the return is insufficient, and the rule for a *procedendo* must be discharged.

HOLROYD, J.—I am also clearly of opinion that this

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is a bad return. No general custom to make-byelaws can support a byelaw in restraint of trade. *Harrison v. Godman*, therefore, is expressly in point here, for this is a byelaw in restraint of trade, and can only be supported by setting out a special custom to make that particular byelaw; and no such custom is set out.

LITLEDALE, J.—The return is clearly insufficient. There is nothing before us which can authorise us in taking notice that the byelaw ever existed. The return in *Waganor's* case was undoubtedly similar to this; but the decision there did not turn upon that point, and the return there did recite the custom, which this return does not. Nothing, however, short of setting out and alleging the custom as a fact, will suffice: no recital of it will do. This is a byelaw in restraint of trade, and a custom to make such byelaws is certainly not to be favoured. Lord Holt expressed himself of that opinion in the case of *The Mayor of Winton v. Wilks* (a), and I entirely concur with him on the point. In *Waganor's* case, it is said, “It was resolved that there (is) a difference between such a custom within a city, &c., and a charter granted to a city, &c., to such effect; for it is good by way of custom, but not by grant; and, therefore, no corporation made within time of memory can have such privilege, unless it be by act of parliament. So a custom that goods foreign bought, and foreign sold, within a city, shall be forfeited, is good, as appears, *Dyer*, M. 10, and 11 *Eliz.* 279; but such privilege cannot begin by charter.” Now if the king's charter cannot confer a privilege which operates to restrain trade, surely a byelaw, unsupported by a special custom, cannot be allowed so to operate; and there is nothing upon the face of the return to shew, that the company to which it is contended the defendant is bound to belong, has existed from time immemorial. Upon the whole, therefore, this return con-

(a) 1 Salk. 203.

tains no evidence of the existence of any custom to support this bye law, and as the bye law, being in restraint of trade, cannot stand without such support, the return is bad in toto; and consequently there is no ground for granting a procedendo.

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Rule discharged.

Bolland then applied for leave to amend the return, but the Court said that in such a case they ought not to lend the corporation any favour or assistance, and therefore refused the application.

BROWN v. BURTINSHAW.

ASSUMPSIT. The declaration stated, that "heretofore, to wit, on 20th *May*, 1824, at *Stockport*, in the county palatine of *Chester*, by a certain agreement then and there made between plaintiff and defendant, defendant agreed to let to plaintiff two upper rooms, and part of a lower room, as a workshop and a smithy, and to find power to turn three lathes, and one upright drill, and one fly saw; and plaintiff agreed to pay rent for the same, 6*l.* per year, to find power for three lathes, &c.; defendant agreed to pay rent for the above, 6*l.* per year, to be paid quarterly in cash; and that three months' notice was to be required on each party." Plaintiff took possession of the rooms the same day, and defendant found the power. On the 20th *August*, defendant served plaintiff with a written notice of that date, to quit the rooms on the 20th *November* following. Plaintiff did not then object to the notice, but held over after the 20th *November*, from which day defendant ceased to find the power. On the 19th *January*, 1825, plaintiff and defendant settled their accounts up to the 20th *November* preceding, when plaintiff agreed to give up the key of the rooms; but afterwards refused to do so, saying "that the notice was bad;" to which defendant replied, "then there would soon be another quarter's rent due." In an action by plaintiff for damages for the discontinuance of the power by defendant:—Held, that the agreement was a demise of a tenement, creating a tenancy which could not be determined but by a notice ending with the current year, except by custom; and that the plaintiff's agreeing to give up the key *when he did*, was no acquiescence in the notice served upon him, and no surrender of his tenancy within the Statute of Frauds: though such an acquiescence, if established, would have been a bar to the action.

By agreement
 in writing,
 dated 20th
May, 1824,
 defendant
 "agreed to
 let plaintiff
 two upper
 rooms, and
 part of a lower
 room, as a
 workshop and
 smithy, and to

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be paid quarterly in cash : and by the said agreement three months' notice was required on each party." Averment of mutual promises, and of entry and performance by plaintiff. " And although defendant, in part performance of the said agreement of his said promise, &c., did find power to turn the said lathes, drill, and fly saw, from the time of making the said agreement, until 20th *November*, in the year aforesaid, yet defendant, not further regarding, &c., did not, nor would, at any time since, find power to turn the said lathes, drill, and fly saw, or any of them ; and by means of the premises, &c.;" concluding with averment of special damage. Plea non-assumpsit, and issue thereon. At the trial before *Warren*, C. J., at the *Chester* spring assizes, 1825, the agreement was produced on the part of the plaintiff, being stamped as a lease, and in terms as follows :

- *Stockport. May 20th, 1824.*

" *John Burtinshaw* agrees to let *Mr. John Brown* two upper rooms, and part of a lower room, as workshop and smithy, and to find power for to turn three lathes, and one upright drill, and one fly saw. *Mr. John Brown* agrees to pay rent for the above, 6*l.* per year, and to be paid quarterly in cash, and that three months' notice is to be required on each party.

(Signed)

"*Jno. Burtinshaw.*"

The defendant's execution of this agreement having been proved, it further appeared, that the plaintiff entered upon the premises at the date thereof, and was supplied by the defendant with power, pursuant to the agreement, until the 20th *November*, 1824, when the supply was stopped ; whereby the plaintiff was prevented from carrying on his business, and sustained damage to the amount of 11*6l.* The defence set up, and proved in evidence, was this. On the 20th *August*, 1824, the defendant served upon the plaintiff a written notice, dated the same day, to quit the rooms on the 20th *November* following. The notice made no mention of the power. At the time of receiving the

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notice, the plaintiff said to the defendant's partner, who served it, "that he would endeavour to get turning somewhere else; but he could not get it turned by the hand." The plaintiff did not then make any objection to the notice. The plaintiff continued to hold the rooms after the expiration of the notice, and on the 19th *January*, 1825, he came to a settlement of accounts with the defendant, when the defendant paid the plaintiff 10*l.*, being the balance of accounts between them, up to the 20th *November* previous, for rent due on the one hand, and for money due for work on the other: and on that occasion the plaintiff promised to give up the key of the rooms, but afterwards refused to do so, alleging that the notice was irregular; to which the defendant replied, "in that case another quarter's rent would soon be due." The usage at *Stockport*, where the premises were situated, was to determine *such* tenancies by a three months' notice to quit, without reference to the expiration of a year. Upon this evidence it was contended, on the part of the defendant, that he had made out a good defence; that the notice being valid by the custom of the country, was binding upon the plaintiff; and that, therefore, he could not maintain any action for damage sustained by the withholding of the power subsequently to the expiration of that notice; but, that even if the notice was not binding in the first instance, the plaintiff had rendered it so by afterwards acquiescing in it, and had consequently waived his right of taking that objection. On the other hand, it was contended on the part of the plaintiff, that this evidence constituted no defence; that the usage, not being mentioned in the agreement, was not binding upon him, and the notice there mentioned was by construction of law a notice to end with the current year of the tenancy; that the notice served, therefore, was bad; first, for not ending with the current year of the tenancy, which was a tenancy from year to year, or at least for one year certain; and second, for being one day short of three months, having been served on the 20th *August*, to quit on the 20th No-

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vember, whereas it should have been served on the 19th *August*; and that there was not sufficient evidence of the plaintiff's acquiescence in the notice to waive his right of objecting to it, though even if there was, the defendant had waived both that and the service of the notice, by his subsequent declaration, that another quarter's rent would soon be due. The learned judge declined giving any opinion upon the validity of the notice, or the operation of the usage in point of law, and left it to the jury to say, in point of fact, whether the plaintiff had, or had not, acquiesced in the notice to quit; directing them, if they should be of opinion that he had, to find for the defendant. The jury found for the defendant, and the plaintiff had leave to move upon the points of law to enter a verdict in his favour, with 116*l.* damages, it being admitted that he had been damnified to that amount, if he was entitled to sustain the action in other respects.

Cross, Serjt., in *Easter* term last, moved accordingly, and obtained a rule nisi, against which

D. F. Jones now shewed cause. This rule was obtained under the erroneous impression, that the same rules of law apply to a taking of machinery as to a taking of land. The fact is not so. First, the contract in this case did not create either a tenancy from year to year, or for one year certain. It was a contract for a quarterly tenancy, determinable by a quarter's notice. The expression, "per year," occurs in the contract, but it has reference only to the rate or amount of the rent. A general taking of land is, undoubtedly, by construction of law, a taking for a year; it is reasonable and convenient for both parties that it should be so; but it is not so with respect to a taking of machinery. There is a good reason in the present case, and in all similar cases, why the taking should be quarterly and not yearly, namely, that it must be doubtful whether the landlord will be able to supply the power

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necessary for the working of the machinery for a whole year, but he can safely undertake to supply it for a quarter. In this case, the defendant found at the end of the first quarter, that he should not be able to go on to supply the power, and therefore he then gave the plaintiff a quarter's notice to quit, according to the terms of the contract. Then, secondly, this was a good notice to quit, though it did not end with the current year of the tenancy. It must be admitted to have been decided in *Doe v. Donovan* (a), that if a house is let from year to year, to quit at a quarter's notice, the notice must be given to quit at the end of a quarter expiring with a year of the tenancy: though it was even there held by *Chambre, J.*, that if the demise is for one year only, and then to continue tenant afterwards, and to quit at a quarter's notice, a quarter's notice ending at any time will be sufficient. But that was a demise of a house, and the reasons for requiring a notice ending with a year of the tenancy, do not apply here, for this is not a demise of a house. The real subject matter of the contract in this case was the power for the working of the machinery, and the apartments in which the machinery stood were merely incidental to it. There was no demise of a *tenement* in this case, in the legal sense of the word. In *Rex v. Mellor* (b), it was held, that a contract for a standing place in another's mill for a carding machine, the party's own property, which was fastened to the floor and the roof, for the purpose of being worked by the steam engine of the mill, for which the party was to give 20*l.* a year, with liberty to quit on giving three months' notice, was not a taking of a tenement, but a mere license to use the machinery of the mill; and therefore that no settlement could be gained under it. So here, this is not such a taking of a tenement as would confer a settlement, and therefore upon the same principle, and by analogy, not such as requires a regular legal notice to quit. [*Bayley, J.* There is clearly a taking of a tenement here; the agree-

(a) 1 Taunt. 555.

(b) 2 East, 189.

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ment is expressly to let two upper rooms and part of a lower one, as a workshop and smithy; the plaintiff therefore was to have the full use of those rooms, and there was nothing to hinder him from sleeping in one of them, if he had chosen so to do]. The thing demised was the power; the rooms were only incidents to the power; therefore there was no tenement demised. The power is the subject matter of the contract, and the contract must be construed with reference to that subject matter. So in *Roe v. Lees*(a), it was contended that the tenant must be supposed to have taken the land according to the custom of the country; but the Court held otherwise, and that he must be taken to have contracted with reference to the real subject matter of the contract. But here, thirdly, the custom of the country renders the notice valid, and that custom is binding upon the plaintiff. It was proved that the usage in the neighbourhood was to determine tenancies like this by a notice such as this: the plaintiff must be presumed to have known of that usage, and to have contracted with reference to it; and consequently the notice, being conformable to the usage, must be held binding upon him. Fourthly, there was evidence at the trial, to shew that the plaintiff acquiesced in the notice; and having once done that, he has waived all right of objecting to it. That evidence was properly left to the jury; they have decided upon it; and the Court will not interfere with their decision. Upon all these grounds it is submitted, that the facts proved at the trial on the part of the defendant constituted a good defence to this action; that the verdict found in his favour is a proper verdict; and that consequently this rule has no ground of support, and must be discharged.

Cross, Serjt., contra. The custom, even admitting it to have been proved, and, as proved, to be binding upon the plaintiff, does not assist the defendant, because it applies exclusively to the power. But the power is not the

(a) 2 Sir W. Bl. 1171.

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subject of demise, for the defendant agrees to *let rooms*, and to *find power*; this, therefore, is a demise by the one, and a taking by the other, of a tenement and premises, from year to year, and can be determined only by a regular notice to quit, ending with the current year of the tenancy. Now no such notice has been given, and therefore, that objection to the plaintiff's maintaining this action is removed at once. But, supposing the argument on the other side to be good, and that this is a demise of the power only, the plaintiff has received no notice to quit at all, for the notice is merely to quit the rooms, and makes no mention whatever of the power. Then, it is said, that however faulty the notice may be, the plaintiff has rendered it binding, because he has acquiesced in it. The jury, indeed, have found by their verdict that he did so, but there was no evidence to warrant that finding, and the question of acquiescence, or no acquiescence, was a question of law, and not of fact, and ought not to have been left to the jury. But *when* did the plaintiff acquiesce in the notice, if, by construction of law, he *ever* did so? The notice was served on the 20th of *August*, to quit on the 20th of *November*, and on the 19th of *January* the plaintiff, certainly, did say, that he would give up the key. That was no acquiescence quoad the subject matter of this action. The plaintiff had then sustained a damage, and the law knows of no such thing as an *ex post facto* acquiescence to give validity to a bad notice, and to invalidate a good cause of action. But if he did acquiesce, it was by parol, and that is not sufficient; for he had an existing tenant right at the time, which he held under a written demise, and which, therefore, he could not, by the express provision of the Statute of Frauds, 29 *Car.* 2, c. 3, s. 3, surrender, except by a note in writing (*a*). (Here the Court stopped him).

BAYLEY, J.—I am clearly of opinion that the verdict

(*a*) See 6 East, 86. 12 East, 134. Ante 411, and the cases there cited.

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found for the defendant in this case cannot be allowed to stand. That verdict is evidently founded entirely upon the supposed fact of the plaintiff's having acquiesced in the notice to quit, served upon him by the defendant. If the fact of his acquiescence had been satisfactorily proved, although such an acquiescence, being by parol, could not operate as a surrender of the tenancy within the Statute of Frauds, still it would have operated as a bar to the plaintiff's right of maintaining this action, which is for damages arising out of the non-supply of the power, subsequently to the expiration of the notice to quit. But, as it seems to me, there was not evidence in this case to justify the inference that the plaintiff did acquiesce in the notice, even by parol; all that he did was at one time, long after the expiration of the notice, to agree to deliver up the key of the premises; but he never did deliver it up, and, on the contrary, he almost immediately resolved to keep it, in which resolution the defendant on his part acquiesced, for he warned him that in that case he would become liable for another quarter's rent. Besides, an acquiescence in a notice, given two months after that notice has expired, is, in my opinion, given far too late to have any operation: and upon that point it does not appear that the jury received any direction from the learned judge, which if the question was to be left to them at all, they certainly ought to have received. On the other hand, however, I am as clearly of opinion, that we ought not, upon this evidence, to make the rule absolute for entering a verdict for the plaintiff. Where a particular usage prevails in a particular district, a contract made between parties resident within that district, and which makes no mention of the usage, must, generally speaking, be taken to have been made subject to, and in conformity with, such usage: for though usage is not admissible to defeat or contradict a contract, it is admissible to explain and confirm it. *Senior v. Armitage* (a). Here, if the contract is silent upon the

(a) Holt, N. P. C. 197.

matters to which the custom applies, evidence of the custom was properly receivable to explain the contract in that respect. Now the contract is silent as to the term of the holding; no express term is mentioned, nor is any particular term necessarily to be inferred from its language; for the phrase, "per year," seems to me to have reference to the rate of the rent, and not to the duration of the term. With respect to the precise form of the notice also, or the time when it is to be dated, and when it is to expire, the agreement is equally silent; and, therefore, evidence of the usage on that point was properly receivable. The evidence produced upon that subject seems, however, to have been slight, and the parties do not appear to have been in a situation to discuss the question of usage, with all the accuracy it requires. Upon the evidence, as it appears before us, it is still left a matter of doubt in my mind whether the notice to quit given in this case was the customary and valid notice, or not; and, therefore, I am of opinion that the best mode of doing justice between these parties will be, to send the case for fuller investigation before another jury. Under all the circumstances of the case, I think the costs of the former trial ought to abide the event of the new trial, on both sides.

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HOLROYD, J., and LITTLEDALE, J., concurred.

Rule absolute for a new trial (a).

(a) See 8 East, 165. 2 Salk. 414. 3 Burr. 1609. 1 Ld. Rd. 707. 3 T. R. 16. 7 T. R. 83. 8 T. R. 3. 1 T. R. 162. 2 Camp. 256. 5 Taunt. 519. 2 Camp. 103. 2 Stark. R. 379. 2 Esp. 506. 1 Esp. 266. 3 Wils. 25. 6 Esp. 53.

Note.—There were some other cases decided at the sittings before the three judges in *Michaelmas* vacation, which the editors are under the necessity of postponing for the present, from their inability to procure papers, essential to the accuracy of the reports thereof.

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Wednesday,
25th January.

An affidavit to support a rule for an attachment for not paying money pursuant to the Master's allocatur, must shew that at the time of serving the copy, the original was shewn to the defendant.

REID v. DEER.

MAULE moved for an attachment against the defendant for not paying a sum of money pursuant to the Master's allocatur. The affidavit in support of the motion stated, a personal service of a copy of the allocatur on the defendant, and a demand and refusal of the money, but did not go on to say that the defendant had, at the same time, shewn the original. He could not find that it had been any where expressly laid down in such a case as this, that the original allocatur must be shewn to the defendant. In *Rex v. Smithies (a)*, it had certainly been so held, in the case of a motion for an attachment for disobedience to a rule for inspecting corporation books.

BAYLEY, J.—It is the invariable practice to shew the party the original rule at the time of serving the copy, before you can bring him into contempt.

PER CUR.'

Rule refused.

(a) 3 T. R. 351.

Wednesday,
25th January.

FURILLIO v. CROWTHER.

Where the supposed father of an illegitimate child had made various payments for its maintenance and then refused to continue its support until the mother obtained an order of filiation:—Held, that no action would lie for arrears of maintenance, at the suit of the mother.

ASSUMPSIT for the board and lodging of an illegitimate child. Plea, the general issue. At the trial before *Abbott, C. J.*, at the *Middlesex* sittings after last term, it appeared in evidence, that for a considerable time prior to the commencement of this action, the defendant had paid

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the plaintiff a weekly allowance of twelve shillings, for the maintenance of the child in question. In consequence of an application made by the plaintiff's attorney to the defendant, for the payment of the arrears for which this action was brought, the defendant's attorneys wrote to the plaintiff's, as follows :

“WE are instructed by our client to say that he will not make any more weekly payments to your client for the support of the child of which she alleges him to be the father, unless he can be satisfied by a magistrate's order made on her oath, that he is the person who ought to make such payments.” Nothing further being done, this action was commenced. On the part of the defendant, it was contended that the action was not maintainable, there being no obligation in law on him to maintain an illegitimate child ; and that the only mode of enforcing his liability was by proceedings under the 18 *Eliz.* c. 3, which in this case had not been adopted. For the plaintiff, it was insisted that there being a moral obligation on the father of an illegitimate child to maintain it, sufficient, at least, to support a contract, and as the defendant had by previous payments acknowledged his liability to maintain this child ; and the letter in question being only a conditional renunciation of the contract, the action was maintainable. The jury, under the learned Judge's directions, found for the defendant, but leave was given to move to enter a verdict for the plaintiff for 30*l.*

Scarlett now moved accordingly. There is a moral obligation on the father of an illegitimate child to maintain his offspring ; at least, such an obligation as is sufficient to found a contract. This is a duty of imperfect obligation, and though by the laws of this country the only mode of compelling the father of an illegitimate child to maintain it, is by an order of filiation under the statute of *Elizabeth* ; still if a person once enters into a contract for the support of such a child, there is a suffi-

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cient moral obligation which a court of law will enforce. The question then is, whether a contract of this nature is not binding unless there is something to shew that it has been distinctly and unequivocally renounced. The defendant is in this predicament; he admits the birth of the child, and he pays for its maintenance for a considerable length of time, which is an acknowledgment of his liability to support it. Probably he might renounce the contract, altogether, or he might put the plaintiff to the remedy given by the statute of *Elizabeth*; but this he does not do. He desires his attorney to write for farther explanation as to his liability. This is not putting an end to his contract. If he meant to renounce his liability he should have done so in express terms, and it lay upon him to shew that the contract was rescinded.

PER CURIAM.—It is quite clear that this action is not maintainable. The defendant is under no legal obligation to maintain the child unless the steps are taken which the statute of *Elizabeth* requires. The by-gone payments were merely voluntary, and he was not bound to continue them longer than he thought proper.

Rule refused.

Wednesday,
25th January.

BAGSTER and others v. EARL PORTSMOUTH.

A lunatic is capable of contracting for necessities.

Therefore, where a person of rank ordered car-

riages suitable to his condition, and the coachmaker supplied them bonâ fide and without fraud, and they were actually used by the party :—Held, that an action would lie upon the contract, notwithstanding an inquisition of lunacy finding the party to be of unsound mind at the time the carriages were ordered.


ASSUMPSIT on a contract for the hire and use of certain carriages and harness, with counts for goods sold and delivered, work and labour, &c. Plea, non assumpsit and issue thereon. At the trial before *Abbott*, C. J., at the *Middlesex* sittings after last *Michaelmas* term, the plaintiffs,

who are coachmakers, gave in evidence two written contracts signed by the defendant in 1817 and 1818, for the hire of a phaeton and a landau, respectively, with the use of suitable harness. The carriages had been made to the defendant's order, and he was to have them at so much per annum, for a certain number of years, the plaintiffs painting and keeping them in repair. Proof was given of the delivery of the carriages and of the frequent use of them by the defendant after delivery. The answer to the action was, that the defendant was of insane mind at the time of making the contracts, and that by law the contracts of a lunatic are absolutely null and void to all intents and purposes. It was admitted on the part of the plaintiffs that, in consequence of a commission of lunacy issuing out of Chancery in 1823, the defendant had been found and declared of insane mind and unfit to have the government of himself, his lands, tenements, goods and chattels, from the 1st *June*, 1809, until the time of taking the inquisition ; but it was argued that a lunatic was liable for necessaries suitable to his degree, on the same principle as an infant's liability is founded, notwithstanding his general incapacity to contract. The Lord Chief Justice was clearly of opinion, that the carriages, &c., in question, being suitable to the degree of the defendant, and as they had actually been ordered and enjoyed by him, the plaintiffs had a right to recover, and the plaintiffs had a verdict accordingly.

Brougham now moved for a rule nisi to enter a nonsuit. Lunacy is, in law, an answer to an action upon a contract. Independently of any authority upon the subject, general reasoning would support the position, that a person of insane mind is incapable of entering into any contract either express or implied. Upon principle, a lunatic, being bereft of all reason, is considered in the eye of the law as if he were naturally dead. It is true that in some cases it has been said, that a person in this melancholy situation

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cannot avail himself of this defence, *Stroud v. Marshall* (a), *Cross v. Andrews* (b); because no man shall be permitted to stultify himself by setting up his own insanity. Originally the law was otherwise, *Fitzherbert*, N. B., 202 d; *Co. Litt.* 247 a, b, *Beverly's case* (c), and in modern times, it seems to have been clearly established that insanity is a good defence; *Yates v. Boen* (d), *Sergeson v. Sealy* (e), and *Faulder v. Silk* (f). [Bayley, J. Those were cases of bonds or other specialties. Suppose in an action on a bond a defendant gave in evidence that he was intoxicated with liquor at the time of execution, would not that be an answer to the action?] There is a vast difference between a mental infirmity brought on by a party's own excess, and an insanity of mind resulting from the visitation of God. A lunatic is in the eye of the law as incapable of contracting as if he were naturally dead. In this respect the plea of lunacy differs from that of infancy. An infant is not mentally incapacitated, and he may affirm his contracts when of age; but a confirmed lunatic can never be bound by an act done during the operation of his malady. [Bayley, J. Suppose he obtains meat from a butcher, or clothes from a tailor, do you mean to contend that he would not be liable to an action for meat or clothes, as necessaries?] No doubt great inconveniences may arise from the principle contended for, but it is submitted that no distinction exists between necessaries and luxuries, or between simple contracts and specialties. A lunatic is utterly incapable of binding himself by any contract, either express or implied. Here it is found by the inquisition that the defendant was of insane mind, at the very time he entered into the contracts in question, and in point of law he is not liable.

(a) Cro. Eliz. 398.

(c) 4 Rep. 1236.

(e) 2 Atk. 412.


(b) Id. 622.

(d) Stra. 1104.

(f) 3 Campb. 126.

ABBOTT, C. J.—I was of opinion at the trial, that the evidence produced in this case was not such as ought to defeat the plaintiff's right of recovering in the present action, considering that it was brought for the hire and use of carriages suited to the state and degree of the defendant, and by him actually ordered and enjoyed. That was the ground on which I expressed my opinion. I, however, took care to distinguish this from the case of an unexecuted contract, entered into under such circumstances as might lead any reasonable person to conclude, that at the time it was made, the party was of unsound mind. A case of the latter description would come under that class, where imposition is practised upon, or advantage taken of the mental infirmity of the contracting party. To such cases I by no means wish to extend the opinion which I have formed in the present instance. My judgment is governed by a reference to the particular circumstances of this case; and it is not to be understood as embracing cases of the description to which I have alluded. Imbecility of mind may or may not be a defence in the case of an unexecuted contract; I am not saying that it would, nor does my present opinion decide that it would not.

BAYLEY, J.—Imposition and fraud, generally speaking, are grounds for vacating all contracts; and with respect to the case of a person of unsound mind, if it can be proved that he has been defrauded, or an undue advantage taken of his imbecility, a court of law will not enforce his contract. But where there is no imposition practised, and the goods supplied appear to be suitable for the condition and degree of the party receiving them, and which, in the ordinary habits of life he would be likely to require, I think the mere fact of his being of unsound mind, and incapacitated from making his own contracts, will not deprive a tradesman of his right of suing in a court of law for the value of the goods for which he has given credit. There may be great difficulty in predicating on the first,

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view, that a person is of unsound mind. It is well known that there are many individuals capable of speaking and acting most rationally, and who are of perfectly sound mind as to all the ordinary transactions of life, but on some particular subjects suffer under an aberration from sound reason. If persons of this description make an application for credit to a tradesman, who is not aware of their infirmity on some particular points, and he bonâ fide supplies them with goods, which are suitable to their state and degree, it would be most unjust, that his claim in a court of law should be defeated by the fact that a commission of lunacy had been awarded, and his debtors found on inquest to be insane. There is here no suggestion that the plaintiffs have not bonâ fide given the defendant credit. Exhibiting about him no appearance of mental incapacity, he goes to the plaintiffs' house and orders carriages, which are afterwards used by him. They are suitable to his condition and degree in life, and such as would have been supplied by other persons, if not by the plaintiffs. Under these circumstances, I think law and justice require that the plaintiffs should be allowed to maintain an action against the lunatic. If the friends and relations of such a person are satisfied that he is incapable of conducting his own affairs, it is competent to them to adopt such measures as shall prevent him from exposure to imposition; but I think an imposition would be practised upon the plaintiffs if, under the circumstances of this particular case, the plea of lunacy could prevail.

HOLROYD, J., concurred.

LITLEDALE, J.—There is no doubt that a deed, bond, or other specialty, may be avoided by a plea of lunacy, if at the time it was executed the contracting party was non compos mentis; but it seems to me that the rule of law in this respect does not apply to the case of necessities supplied to a person who is, generally speaking, of

sound mind, but insane on some particular subject. It is true that the inquisition in this case, finds retrospectively, that the defendant was of unsound mind both before and at the time these contracts were entered into, but I think that does not make any difference.


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Rule refused.

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ASSUMPSIT. One of the defendants pleaded the general issue, non assumpsit; the other defendant suffered judgment to go by default. At the trial, the counsel for the plaintiff finding that he was unable to establish his case, claimed the right of electing to be nonsuited. The counsel for the defendants objected that he had no such right, but that as one of the defendants had suffered judgment to go by default; the other defendant, who had pleaded, had a right to insist upon a verdict being now found, one way or the other, as to himself. The objection was overruled, and the plaintiff was nonsuited.


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 In a joint action of assumpsit against two defendants, one of whom suffers judgment by default, and the other goes to trial, the plaintiff may elect to be nonsuited as against the latter, if he finds that he cannot make out his case.

Gurney now moved for a rule nisi to set aside the nonsuit, and to enter a verdict for the defendant who had pleaded, and renewed the objection. *Mr. Tidd*, in his practice, expressly lays it down, that "in a joint action against several defendants, the plaintiff cannot be nonsuited as to one of them only: and therefore if one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited as to him; but such defendant must have a verdict, if the plaintiff fail to make out his case (a). And the cases which he cites seem to go the whole length of his position. In *Weller v. Goyton* and *Walker* (b), where one defendant suffered

(a) *Tidd*, 908, 6th ed.

(b) 1 Burr. 358.

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judgment by default, the other joined issue, the plaintiff omitted to try, and a rule for judgment as in case of a nonsuit was obtained, the question was, whether the Master could tax costs as in case of a nonsuit. Lord *Mansfield* had a doubt, whether there could be judgment as in case of a nonsuit, *in a case where the plaintiff was not liable to a nonsuit*; and said, "here was a judgment obtained by the plaintiff against one of the defendants already: how then can the plaintiff be out of court as to him? But if he is nonsuited in this action, he will be out of court, as against both defendants:" and *Denison*, J., seemed to think also, that the plaintiff would not have been liable to a nonsuit at the trial. In *Harris v. Butterley* and another (a), it was said, "in trespass against several, if any suffer judgment by default, the plaintiff need only give evidence to affect the rest; and it is matter for the jury, whether the trespass proved be the same as that confessed: *but the plaintiff cannot be nonsuited.*" In *Hannay v. Smith and Williams* (b), it was held, that if one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited as to him, but such defendant must have a verdict if the plaintiff fail to make out his case. Upon these authorities, it seems clear that this nonsuit was irregular.

ABBOTT, C. J.—Notwithstanding the authorities which have been cited, and the course of practice which has certainly been conformable to them, I am of opinion that the plaintiff in this case was entitled to be nonsuited. In former times, it was the custom always to call the plaintiff into court to hear the verdict; for he was not bound to be present; and according to principle and reason, a verdict against him could not be taken in his absence.

BAYLEY, J.—The ancient principle was, that the plain-

(a) Cowp. 483.

(b) 3 T. R. 662.

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tiff had a right to hear the verdict, but that he was not bound to be present for that purpose. Therefore, when he failed to make out his case he was called: if he appeared, a verdict was taken against him; if he did not appear, he was nonsuited. A verdict against him could not be taken in his absence. Besides, the Court has always a discretionary power to enter a nonsuit, where the plaintiff fails in his case; and in a recent instance we ordered a nonsuit to be entered after a verdict found for the defendant, in order that the plaintiff might not be precluded from bringing another action (a).

HOLROYD, J.—One of the defendants suffering judgment by default, does not alter the plaintiff's right to be nonsuited as to the other defendant. The only distinction in the case of judgment by default is, that in such case a verdict may be taken against the defendant, but cannot be taken against the plaintiff, in his absence.

LITLEDALE, J.—According to the formal language of the *postea*, the plaintiff and defendant are both present in Court to hear the verdict pronounced, and the rule of practice has always been that a verdict cannot be pronounced against the plaintiff, in his absence. The judgment by default makes no difference; because though the defendant thereby admits that he is liable to the action, the plaintiff is equally at liberty to forego his right of action against him, and to prosecute his suit no further. I agree that this nonsuit was regular.

Rule refused.

(a) *Hodgson v. Forster*, ante vol. ii. 221. 1 B. & C. 110.

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If a warrant of commitment in execution manifestly defective on the face of it, shews that there has been a conviction, the Court will not notice the defect, until the conviction is returned into Court.

Conviction on the 4 Geo. 4, c. 34, of an apprentice for misbehaviour, must shew on the face of it, that the defendant is an apprentice within the 4 Geo. 4, c. 29, which extends previous acts to apprentices, upon whose binding out no larger sum than 25*l.* has been paid.

THE defendant and three others, apprentices, had been severally and respectively committed to the house of correction at *Brixton*, in the county of *Surrey*, upon the warrants of two justices, under the authority of stat. 4 Geo. 4, c. 34, for misconduct in their masters' employment.

Brodrick moved for writs of habeas corpus to bring up the bodies of the defendants, for the purpose of being discharged upon an objection applicable to all the warrants of commitment, namely, that they respectively omitted to shew on the face of them that the magistrates had any jurisdiction over the offence imputed to the defendants. By 4 Geo. 4, c. 29, after reciting that by 20 Geo. 2, c. 19, magistrates had certain powers in cases of poor apprentices, and of other apprentices, upon whose binding no more than 5*l.* was given, and that by 3 Geo. 3, c. 55, certain powers are given to justices of the peace in cases of apprentices put out by the parish, or upon whose binding no greater sum than 10*l.* was given, on complaints of ill usage, by their masters or mistresses, and that it was expedient to extend the said acts to apprentices, upon whose binding a larger sum than 5*l.* or 10*l.* was paid, it is enacted, that the provisions of the said acts, so far as they relate to apprentices, shall be deemed to extend to all apprentices upon whose binding out no larger sum than 25*l.* was or shall be paid. By 4 Geo. 4, c. 34, reciting 20 Geo. 2, c. 19; 6 Geo. 3, c. 25; and 4 Geo. 4, c. 29; and that it was expedient to extend the powers of the said acts, it is enacted, that it shall be lawful, not only for any master or mistress, but also for his or her steward, &c., to make complaint upon oath, against any apprentice, within the meaning of the said acts, to any justice of peace of the county or place

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where such apprentice shall be employed, of or for any misdemeanour, misconduct, or ill behaviour of any such apprentice; or if such apprentice shall have absconded, it shall be lawful for any justice of peace of the county or place where such apprentice shall be found, or shall have been employed, and on complaint thereof, made on oath by such master, &c., which oath the said justice is hereby empowered to administer, and to issue his warrant for apprehending every such apprentice; and further to hear and determine the same complaint, and to punish the offender by abating the whole or any part of his or her wages, or otherwise by commitment to the house of correction, there to remain and to be held to hard labour, for a reasonable time, not exceeding three months. Now the warrants on which these defendants had been committed, did not state that no larger a sum than 25*l.* had been paid upon their binding respectively, which they ought to have done, in order to shew that the justices had jurisdiction, and consequently the defendants must be discharged. [*Bayley, J.* If there be a good conviction, will not that cure the objection?] But assuming there to be a good conviction, still the warrant of commitment must pursue the conviction, and shew that the justices had jurisdiction to commit for the offence of which the defendants have been convicted. In *Rogers v. Jones (a)*, it was held, that a conviction for an offence differing from that recited in the commitment will not justify imprisonment under the latter. [*Bayley, J.* There is an old case in *Fortescue (b)*, which decides this,

(a) Ante vol. v. 268. 3 B. & C. 409.

(b) *Rex v. Hawkins*, Fortesc. 272. On a return to a habeas corpus, signifying that the defendant had been convicted of carrying away deer in a forest, it was objected that it should have said "of unlawfully carrying," &c. *Parker, C. J.* There is a difference in the return of a habeas corpus, where it is before conviction and after; for where it is after, you need not be so particular. It ought to be alleged "unlawfully," if before conviction; but in this case, it may be in the conviction, so that it will be well enough. See *Rex v. Rogers*, ante vol. i. 156; and *Rex v. Helps*, 3 M. & S. 331; *Paley on Convictions*, 2d ed. by *Dowling*, tit. "Commitment."

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that if there is a conviction independently of the commitment, the Court will not discharge on any defect in the warrant of commitment, unless the conviction is before them. *Abbott*, C. J. And that is very reasonable; for otherwise there must be as much certainty and length in the commitment as in the conviction, which would be productive of great inconvenience. We must suppose, until the contrary is shewn, that there is a legal conviction to support the commitment. We must have the conviction brought up, before we can take any notice of a defect in the warrant. For this purpose you may have a certiorari to bring up the record, and writs of habeas corpus to bring up the defendants].

On a subsequent day, the defendants were brought into Court, and the convictions being returned,

Brodrick took six objections to the form of the convictions, but relied mainly on two; first, that they did not shew upon the face of them what apprentice fees had been paid with the defendants, so as to give the justices jurisdiction under the authority of the acts above mentioned; and second, that they did not pursue the general form of conviction given by 3 *Geo.* 4, c. 23, by shewing any information against the defendants, or that the defendants were present when the evidence was given against them, or when the evidence, in support of the convictions, was given.

Notice having been served on the prosecutor, and no opposition being made,

BAYLEY J. (a), said the defendants must be discharged. It appears to me that the convictions ought to shew that the defendants were apprentices within the provision of 4 *Geo.* 4, c. 29, s. 1, that is, apprentices upon whose binding out no larger sum than 25*l.* was respectively paid. These convictions do not shew this, and therefore the justices do

(a) *Abbott*, C. J., and *Littledale*, J., were absent.

not appear to have had any jurisdiction to convict. The convictions are also defective in other respects, for not complying with the summary form given by 3 Geo. 4, c. 23.

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HOLROYD, J., concurred.

Defendants discharged.

(a) See 1 Burn, title, *Apprentices*, and the forms there given, 24th ed. by Chetwynd; and *Rex v. Brown*, 8 T. R. 26.

STOCKDALE v. ONWHYN.


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27th January.

CASE for the infringement of the copy-right in the first volume of a work, entitled, *Memoirs of Harriette Wilson*. Plea, not guilty. At the trial, before Abbott, C. J., at the adjourned *Middlesex* sittings after last term, the work in question, upon being produced and read, appeared to be, avowedly, the memoirs of a courtesan, detailing the history of her own life and amours, and containing anecdotes, all either libelling or ridiculing the various persons with whom she professed to have had intercourse or communication. The learned Judge was of opinion, that the work being one of a generally immoral and libellous nature and tendency, was not entitled to protection in a court of law, and no action could be maintained in respect of any property in it: he therefore nonsuited the plaintiff(a).

The author, or publisher, of a work of a libellous or immoral tendency, can have no legal property in it, and cannot maintain any action for an infringement of his supposed copy-right in it.

Brougham now moved to set aside the nonsuit. It has

(a) There was another point made at the trial, namely, whether the plaintiff had given sufficient evidence that he was entitled to the copy-right in the work; but as the decision of the Court proceeded entirely upon the nature of the work itself, it is not necessary to enter upon the question of evidence here.

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never yet been decided in a court of law, that the property in a work was not entitled to protection, because the nature of the work was such as might render it improper for publication. The discovery of such a decision could never, indeed, have been anticipated; for the impolicy and hardship of it would be apparent. The property in a work is the same, whether the work itself is good or bad; and the argument that it is bad, cannot at all events prevail in favour of a wrong-doer, who is himself reaping a profit from the enlarged circulation of that, which he in his own defence contends is wholly unfit to meet the public eye. Courts of Equity, indeed, have occasionally withheld their protection from the property in works of an immoral tendency, by refusing injunctions to restrain the publication of piracies; but the policy upon which they have so acted, namely, that the refusing protection to such works would discourage the publication of them, has proved to be quite fallacious; for experience has shewn that this very course has been the means of promoting and increasing the cheap circulation of such works, by rival and piratical publishers. The question here, however, is, whether such a work is wholly unentitled to protection in a court of law: and a review of all the cases extant upon the subject, will speedily shew that no such decision has ever yet been come to. The first dictum upon the subject in a court of common law, is that of *Eyre, C. J.*, at the trial of an action brought by the celebrated *Dr. Priestley*, against the hundred of in *Warwickshire (a)*, to recover the value of certain books and papers destroyed by fire by a riotous mob. It was suggested on the part of the defendants, that the plaintiff was in the known habit of writing and publishing works of a seditious tendency, and that it was probable that the books and manuscripts destroyed, were of the same character, in which case the plaintiff could not be entitled to recover their value; and the learned Judge is

(a) Not reported, but cited by *Romilly* in argument, in the case of *Southey v. Sherwood*, 2 Meriv. 435.


represented to have said, that if evidence of that fact was offered by the defendants, he would receive it, and leave it to the jury, in reduction of the plaintiff's demand. With all respect and deference to the memory of that learned judge, such evidence could not legally have been admitted; because the fact of the plaintiff's general habit of writing, could not properly operate to affect the value of the property destroyed, that property, or its nature or tendency, not being before the jury. The next dictum upon this subject is, that of *Lawrence, J.*, in the case of *Fores v. Johnes (a)*. That was an action for the value of prints sold and delivered by the plaintiff to the defendant. The plaintiff was a print seller, and had received from the defendant an order to send him "all the caricature prints that had ever been published." The prints in question were delivered pursuant to that order, and the defendant finding that many of them were of an indecent and immoral character, refused to receive them, whereupon the action was brought. It was contended on the part of the plaintiff, that the defendant's order being general and without exception, he was bound by it; and *Lawrence, J.*, said, "for prints whose objects are general satire, or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for those whose tendency is immoral or obscene: and for which the plaintiff himself might have been rendered criminally answerable for a libel." All that is there said may be admitted without prejudicing the present plaintiff, because the question there turned entirely upon the meaning of the general order given by the defendant for the prints; and it was very properly held, that such an order must be considered as confined to prints of a proper nature, and that it could not be presumed that the defendant had intended to order prints of an indecent or immoral nature, especially as he returned them immediately upon finding them to be such. The next case is that of *Hine v. Dale (b)*,

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(a) 4 Esp. 97.

(b) 2 Camp. 28, note.

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where Lord *Ellenborough* said, "If the composition appeared, on the face of it, to be a libel so gross as to affect the public morals, I should advise the jury to give no damages. I know the court of Chancery, on such an occasion, would grant no injunction." That learned judge did not go the length of saying that he should, in the case he put, nonsuit the plaintiff, or direct the jury to find a verdict for the defendant; but only that he should advise the jury to give *nominal* damages, for so the word *no* must of necessity be construed: and the whole dictum was extra-judicial, supposing an extreme case, which did not occur at the moment; and the work then in question, though in some respects objectionable, was held entitled to protection. Now, if a work, parts of which are unfit for publication, is entitled to protection, that which is throughout of the same character, has the same claim; for where is the line to be drawn? But, giving to all these dicta, the utmost weight that can be claimed for them, what do they amount to? Certainly not to an authority in support of the nonsuit in the present case. Upon what principle can it be held that there shall be no property in an immoral book to support a civil action for pirating it, when there is clearly such a property in it as would support an indictment for a larceny of it? The slightest property is sufficient against a wrong-doer, and here the action is brought against a wrong-doer. [*Littledale, J.* An indictment for the larceny of this book would raise a perfectly different question, for there the property in it would be estimated with reference to the leaves and the leather, and not to the sentiments of the author; and the one is actual property, the other merely ideal]. So, in the present case, the plaintiff has an actual property in the material component parts of the book, and at least he is entitled so far to recover. [*Bayley, J.* He has no right either of property or of possession in such a book; therefore, even if the case could go to a jury in the way last suggested, they would be entitled to find that the work

had no value]. The possession of such a book is not an offence punishable by any known law; therefore, the disturbance of such possession will support an action. At all events trover might be maintained for it; then why not case for pirating it? If there is no property in a work wholly immoral, there can be none in that which is in part so. Where is the line to be drawn? [*Bayley, J.* In the latter case the owner may restore his right of property, by expunging all the maculæ, or offensive parts from the work. *Holroyd, J.* The ground of this action, if any, must be, that the defendant has worked an injury to the plaintiff's exclusive right of publishing the book in question; now it is criminal in him to publish such a book: then he has no right to publish it, and having no right he has sustained no injury, and has no ground of action. That is the difficulty in the case]. Then, what are the cases which have been decided in the courts of Equity upon this subject? In some of them injunctions to restrain the publication of pirated copies of objectionable works, have been granted; in others they have been refused, and the parties have, in express terms, been referred to their remedy in a court of law. In *Walcott v. Waller* (a), and *Southey v. Sherwood* (b), the doctrine laid down has certainly been that such works are not to be aided by a court of Equity; but that only shews that the Court, *may*, in its discretion, refuse an injunction in such cases. In *Bell v. Walker* (c), the application was for an injunction to protect the copy-right in a work entitled, *Memoirs of George Anne Bellamy*. That was a case extremely like the present, for it appeared that the authoress was an actress, and avowedly a woman of intrigue, who in her very title-page alluded to those intrigues, the details of which she promised to give in the body of the work. Yet, there, Lord *Kenyon*, then Master of the Rolls, granted an injunction, upon this sound and enlightened policy, no doubt, that it would be more for

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(a) 7 Vesey, 1.

(b) 2 Meriv. 435.

(c) 1 Bro. C. C. 451.

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the protection of the public morals so far to restrain the publication of the work, than, by refusing the injunction, to extend the circulation of it in a cheaper and more accessible form. A similar difference of opinion was displayed by two preceding equity judges, one of whom refused an injunction to protect the copyright of *The Beggar's Opera*, and the other granted an injunction to protect an exactly similar work, called *Polly*. Then what do all these cases amount to? They only shew that the granting or refusing an injunction in cases of this kind, was never considered as deciding the legal question of copyright one way or the other; but merely as the exercise of a discretionary equitable power, leaving the question of right and property at common law untouched. That question, at common law, has never yet been decided; it is one of great and general importance, involving at once both public policy and private rights; and, under such circumstances, this Court will at least deem it worthy of solemn argument and deliberate consideration, instead of, for the first time, deciding it upon a hurried *ex parte* motion like the present.

ABBOTT, C. J.—This was an action for infringing the plaintiff's copyright in a work called *The Memoirs of Harriette Wilson*. The work professed, and appeared to be the history of the life and amours of an avowed courtesan; many parts of it were highly indecent and obscene; and others were grossly slanderous and scandalous, libelling and holding up to ridicule and contempt a great many individuals by name. The question is, whether the plaintiff is entitled to come into a court of law, and maintain an action for damages for the loss of profit on the sale of *such* a work. Before he can maintain such an action, he must establish his right to sell such a work; for he cannot be allowed to sue another for the sale of that, which he has by law no right to sell himself. Has any man, by the laws of this country, a right to circulate for his own advantage a work

of the detestable description I have mentioned?—No lawyer can be found so ignorant as to suppose that he has; no man, of any rank or profession, can be found degenerate enough to wish that he should. The sale of such a book is a criminal offence in itself; and it is not to be imagined that we, the Judges of a court of law, can recognise that as a right in one form, which we know to be punishable as a violation of the law in another. To do so, would be to outrage every principle of common law, of common sense, and of common justice; and, therefore, I, for one, am of opinion, that we want no judicial authority for deciding, that this action is not maintainable. The decisions of the courts of Equity are no authorities either to lead or restrain us in forming our own judgment on a question like this; nor is it necessary for us to decide which of the opposite courses adopted by the different learned and eminent persons who have held the great seal, was best. Of one point we cannot fail to be convinced, that each was adopted by each with the best views, and for the best purposes. . One of those learned Judges might be of opinion that the interests of the public, and the cause of morality, would be best served, by granting the injunction prayed for, which would have the effect of partially, at least, contracting the circulation of the offensive work: while another might think the same objects more likely to be attained by refusing all protection to such a work, which would discourage future venal and scandalous writers, by withdrawing from their grasp that exclusive profit which is the only inducement to their unworthy labours. I do not feel myself called upon to express any opinion as to which of these measures was the most expedient; it is enough, to say that both were taken with one object, with a view to enforce the common law of the land, which altogether prohibits the publication of such infamous works, and seldom fails eventually to visit both their authors and publishers, with the punishment which they so eminently deserve. Acting consistently with the rules

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and principles of that common law, which must ever be our guide, I am satisfied, that, independently of all authority and all precedent, it is our duty to declare, that the infamous work, for the base profits of which the plaintiff in this case has brought his action, is entitled to no protection in a court of law, and consequently that the present action cannot be maintained.

BAYLEY, J.—I agree most fully in the very able view which my Lord Chief Justice has taken of this case, and I feel it quite unnecessary to add any thing to his powerful exposition of the law upon this subject. I will only observe, that the very same principles which he has laid down have been acted upon in the court of Chancery; for, in the case of *Southey v. Sherwood*, the Lord Chancellor expressly declared, the only ground for granting an injunction was a legal right of property in the work vested in the applicant, and that where a work was of a general immoral tendency, no such right could exist, and therefore, no injunction could be granted.

HOLROYD, J.—I entirely concur in what has fallen from my learned brothers upon this subject. It would be equally preposterous and disgraceful to common sense and to the laws under which we live, to hold that a work such as this was entitled to protection, and that an act, criminal and punishable in itself and its author, could furnish him with a cause of action against any other individual.

LITTLEDALE, J.—I am of the same opinion. The statutes that have been passed for the protection of literary property, have all avowedly one common object, namely, the encouragement of learning; and to extend their protection, or that of the common law, to a work so infamous as that in question, would be not only to defeat that object, but to reflect the deepest disgrace upon learn-

ing itself, and upon every institution which has the encouragement of learning in view.

Rule refused.

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WATSON v. WACE and others.

Wednesday,
25th January.

TRESPASS, by a bankrupt against his assignees, to try the validity of the commission. Plea, not guilty, and issue thereon. At the trial, before *Abbott*, C. J., at the adjourned *Middlesex* sittings after last term, the seizure of the plaintiff's goods under the commission, which was the trespass complained of, being admitted, the defence set up was this. On the 7th *November*, 1823, the plaintiff was arrested, and rendered himself to the King's Bench prison. On the 10th *November*, a docket was struck against him; on the 11th, a commission of bankrupt was issued; and on the 12th, he was declared a bankrupt. On the 2d *December*, the defendants were chosen assignees under the commission, and took possession of the plaintiff's effects. The plaintiff's detaining creditor having proved his debt under the commission, the plaintiff, on the 20th *December*, made application to a Judge to be discharged out of custody, *upon the ground that a commission had issued against him, under which he had been duly declared a bankrupt*; and he obtained his discharge accordingly. Shortly afterwards, the plaintiff petitioned the Lord Chancellor to supersede the commission, alleging that he had never committed an act of bankruptcy. The act of bankruptcy on which the commission was founded was this: the plaintiff was arrested on the 24th *October*, at his own house, but being then at dinner, persuaded the officer to wait for him in another room, and during the officer's absence left the house, and did not return: and

A person against whom a commission of bankrupt has issued, and who has obtained his discharge out of custody in an action pending against him, *on the ground of his bankruptcy*, cannot afterwards dispute the validity of the commission in a court of law: his remedy, if the commission be irregular, is by application to the great seal for a super-seedeas.

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in the course of the same day his attorney called upon the officer, and a bail-bond was executed. Under these circumstances it was contended that the action was not maintainable, inasmuch as the plaintiff having applied for and obtained his discharge out of custody *upon the ground* of his having been *duly* declared a bankrupt, was by that act precluded from afterwards contesting the validity of the commission in a court of law : and the case of *Goldie v. Gunston (a)*, was cited and relied on as directly in point. The Lord Chief Justice, being of opinion that the objection was fatal, nonsuited the plaintiff.

Campbell now moved to set aside the nonsuit. The short question raised at the trial of this cause was, whether a trader who is made a bankrupt while he is in custody for debt, whose detaining creditor afterwards proves the debt under the commission, and who thereupon applies for and obtains his discharge out of custody, is thereby estopped from afterwards disputing the validity of the commission. The nonsuit proceeded upon the ground that he was so estopped, upon the authority of the modern *Nisi Prius* case of *Goldie v. Gunston*. It is submitted, that neither the facts of this case, nor the decision in the case cited, furnish any ground for this nonsuit. There was no plea of estoppel here, therefore the plaintiff was entitled to prove that he had not committed any act of bankruptcy, and had never rendered himself liable to the bankrupt laws ; and that he was not allowed to do. The alleged act of bankruptcy was one created by the 21 *Jac.* 1, c. 19, s. 2 ; namely, the being arrested, and afterwards escaping, which the plaintiff could clearly have disproved ; for, in the first place, the arrest was for a debt under 100*l.*, which does not satisfy the terms of the statute ; and in the second, his absenting himself for the purpose of procuring bail did not constitute an escape : *Rose v. Green (b)*. The commission, therefore, was clearly in-

† (a) 4 Camp. 381.

[(b) 1 Burr. 437.

valid, and the plaintiff ought not to be subjected to the inconveniences arising out of it, merely because he availed himself of one of the advantages which the issuing of the commission, whether valid, or invalid, as a matter of course afforded him, namely, the procuring his discharge out of custody. In point of law, the procuring that discharge was the act of the creditor, and not of the plaintiff; because the moment the creditor had proved his debt under the commission, his right to detain the plaintiff in custody was lost, and the plaintiff became entitled to his discharge. The 48 Geo. 3, c. 121, s. 14, enacts, that the proving a debt under a commission of bankrupt by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved; and it has been held that there need not be a formal discontinuance of the suit before the creditor proves his debt, for the proof itself operates as a discontinuance; *ex-parte Woolley* (a); and that though the creditor may tender his proof, and is entitled to have the judgment of the commissioners upon his right to prove, before he discharges the bankrupt, or discontinues the action, still he must discharge the bankrupt before he actually proves. *Ex-parte Frith* (b). The discharge, therefore, being the act of the creditor, or at least a legal result flowing necessarily from his act in proving the debt, and not the act of the plaintiff, the latter ought not to be prejudiced by it in any respect, and least of all in so important a circumstance as his right to contest the validity of the commission in a court of law. The only ground upon which this action can be held not maintainable, is, that the discharge operates as an estoppel; but there are two answers to that objection: first, that the plaintiff cannot be estopped by an act to which he is not a party; and second, that the defendant cannot take advantage of matter of estoppel, which he has not pleaded. Upon this point he cited 1 Inst. 352,

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(a) 1 Rose, 394. 2 Ves. & Bea. 253.

(b) 1 Glyn & J. 165.

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Com. Dig. *Estoppel*, C., and E. 10., *Pleader*, S. 5., and
Owtram v. Morewood (a).

ABBOTT, C. J.—I am of opinion now, as I was at the trial, that this nonsuit was right. My opinion does not proceed exactly upon the ground that the plaintiff's discharge out of custody as a bankrupt, operated in law as an estoppel to his bringing this action; therefore the question whether the defendant should have pleaded the estoppel does not arise. I acted precisely upon the reasons given by Lord *Ellenborough*, for a similar decision in the case of *Goldie v. Guston* (b), namely, that the facts in the case, and their legal effect, precluded the plaintiff from contesting the validity of the commission in a court of law. Both the plaintiff and the defendant, in the first instance, clearly acted upon the assumption that the commission was valid; the plaintiff by those means obtained a valuable benefit: having done so, he ought not to be allowed now to dispute the validity of the commission, especially as against the very individual by whose co-operation and assistance that benefit was obtained. I cannot express my sentiments upon this case better than in the language used by Lord *Ellenborough* in the case alluded to. He said:—"I think the plaintiff, having taken the benefit of the commission in procuring his discharge under it, is precluded from contesting its validity in a court of law. I conceive he may still apply to the great seal to have it superseded; but I cannot hear him say that he has not been lawfully adjudged a bankrupt, after he has declared that he was so lawfully adjudged, and on that ground obtained his discharge from several actions brought against him. The mere surrender to the commission, I think, would not be enough, as that is a compulsory act; but great confusion would be introduced, if, after he has voluntarily claimed a benefit as a bankrupt, he should be allowed to say, that all those are wrong-doers who have

(a) 3 East, 346.

(b) 4 Camp. 381.

acted under the commission." I think that is sound law, and even justice, and decisive of the present case. The plaintiff here, is not concluded by the nonsuit; he may still apply to the Lord Chancellor to have the commission superseded, if he surrendered to it under the influence of error; but having once availed himself of it to release himself from legal liability, he cannot dispute its validity in a court of law.

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BAYLEY, J.—I am entirely of the same opinion. A man cannot be permitted, first to treat a commission of bankrupt issued against him as valid, and by so doing work a benefit to himself, and an injury to others, and then to maintain an action at law for the purpose of declaring the commission void. It seems to me highly important that it should be understood that the law will not allow an action to be maintained under such circumstances; if it would, a door would be opened for committing frauds upon creditors, which would be equally injurious to the commercial world, and disgraceful to the administration of justice.

HOLROYD and LITTLEDALE, J.'s, concurred.

Rule refused.

OGDEN and others v. ASPINALL.

Friday,
27th January.

SPECIAL assumpsit on an agreement, with the money counts. At the trial before Bayley, J., at the Lancashire

A. gave B.
the following
guaranty:—

"I have given C. an order to purchase cotton, and as it may be to my advantage to have his bills on me negotiated through your house, I have in such case to request that you will honour his drafts to the amount of those he may send to you for sale, on my account, and I engage that his bills on me, so transmitted, shall be regularly accepted and paid."—Held, that under this guaranty, B. was justified in honoring C.'s draft to the amount of a bill drawn by C. on A., and represented by C. to B., as being drawn on account of A., though such bill was in fact drawn by C. on his own account.

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summer assizes, 1823, a verdict was found for the plaintiffs on the money counts, for 490*l.* and interest, with leave for the plaintiffs to move to increase the damages to 990*l.* and interest, and with leave for the defendant to move to enter a nonsuit. Upon both these motions being made in *Michaelmas* term 1823, the Court directed the facts to be stated in the following case.

The plaintiffs are merchants at *New York* in *America*. The defendant is a merchant at *Liverpool*. In the latter end of 1821, one *Hindley* left *Liverpool* and went to *Charleston* in *America*, for the purpose of purchasing cotton for several houses in *Liverpool*, and among others for the defendant. *Hindley* was for this purpose furnished with the letter of guaranty by the defendant hereinafter set forth, and with similar letters to the plaintiffs from the other persons for whom he acted. *Charleston* is about 1200 miles distant from *New York*, and as bills upon *England* cannot be negotiated to any considerable amount at *Charleston*, which is situated in the southern part of the *United States*, it is usual for persons there drawing upon *England*, to transmit such bills for sale and negotiation to *New York*, and the other northern States.

On the 16th *October*, 1821, the defendant wrote the following letter to plaintiff:—

“ *Liverpool*, 16 *October*, 1821.


Messrs. *Ogden, Day, & Co.*,
New York.

GENTLEMEN,

I have given Mr. *T. H. Hindley*, an order to purchase cotton, and as it may be to my advantage to have his bills on me negotiated through your house, I have in such case to request that you will honour his drafts, or make remittances to him to the amount of those he may send to you for sale on my account, and I engage that his bills on me so transmitted, shall be regularly accepted and paid. Please to inform me the rate of exchange at which such bills are sold.

(Signed) *Nicholas Aspinall.*”

On the 30th *November*, 1821, the plaintiffs wrote an answer to the defendant's letter, dated *New York*, *November* 30, 1821, which contained as follows:—"We are favoured with your letter of the 16th *ult.*, from which we observe that you have given our friend Mr. *T. H. Hindley*, an order to purchase cottons on your account, and engaging to honour such bills as he may deem it for your interest to send to us for sale on your account. We shall most readily attend to the negotiation of these bills, and do all in our power to obtain the highest price for them the state of the market will admit of; not failing, agreeable to your request, to advise you the terms on which the same may be disposed of. Exchange is at present higher than we have ever before known it to be; bills having this day been sold at 11 per cent premium, and in one or two instances we believe a trifle higher."

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On the 25th *October*, 1821, when *Hindley* was on the point of sailing from *Liverpool*, for the above-mentioned purposes, the defendant gave him the following letter of instructions:—

Liverpool, *October* 25, 1821.

Mr. *T. H. Hindley*,

DEAR SIR,

As you are about to proceed to *Charleston*, I beg leave to repeat to you, that I am willing to join you in equal shares in all the stained Sea Island cotton you can purchase, and ship to me, and also in such other cottons as may appear for our advantage, drawing your attention to low priced Sea Island cottons at about 20 cents, and to those marks specified on the other side, at the current market price; but I would not wish you to purchase any thing at high prices, under any circumstances: the profit or loss of any description to be equally divided between us, and, as before, no commission to be charged. You can draw upon me for any proportion of the shipments which you may require, sending me bills of lading as early as possible. If you find it for our interest to draw

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through the northern cities, you will pass your drafts upon the agents there at a short sight, say three days. Upon such consignments as you can obtain to my address, I will divide the commission with you, and you may advance as far as seven-eighths of the real value of cotton, on obtaining and sending bills of lading.

(Signed) *Nicholas Aspinall.*"

When *Hindley* arrived in *Charleston*, he made several purchases of cotton for the defendant and himself jointly, and he also bought separately for himself; all of which were consigned to the defendant at *Liverpool*, and bills to the amount of 14,000*l.*, or thereabouts, were drawn by *Hindley* on the defendant, against those consignments, most of which bills were negotiated in pursuance of the above letter, through the plaintiff's house in *New York*, and were regularly accepted and paid by the defendant. In *May*, 1822, *Hindley* purchased a quantity of Sea Island cotton on his own separate account, and shipped the same on board a ship called the *Belvidera*, and consigned the cotton so shipped to the defendant at *Liverpool*, but on his own account and risk. This shipment was on the account and risk of *Hindley*, but the plaintiffs had no notice or knowledge that any person besides the defendant was interested therein. On the 8th *May*, 1822, *Hindley* drew two bills of exchange, one for 490*l.*, and the other for 500*l.*, and on the 9th *May*, two others, one for 473*l.* 1*l.* 2*d.*, and the other for 500*l.*, upon the defendant in favour of the plaintiffs against the last-mentioned consignment; and *Hindley* transmitted all the four last-mentioned bills to the plaintiffs, and drew upon them to the amount of and against all those bills, and the plaintiffs duly honoured and paid such drafts of *Hindley* to that amount.

The bill for 500*l.* drawn on the 8th *May*, and the bill for 473*l.* 1*l.* 2*d.* drawn on the 9th *May*, were regularly accepted and paid by the defendant; but the defendant refused to accept or pay the bill drawn on the 8th *May*, for 490*l.*, or the bill drawn on the 9th *May* for 500*l.*; and

those two bills were regularly presented for acceptance and payment, and were regularly protested.

The two bills mentioned to have been drawn on the 8th *May* were transmitted by *Hindley* to the plaintiffs in the following letter, dated the 8th *May*, and addressed to them :—" You have enclosed my two bills of exchange on Mr. N. *Aspinall*, one for 500*l.*, and the other for 490*l.*, together 990*l.*, which you will please negotiate on the best terms you can, giving me credit for the nett proceeds. On the account of the above bills I have this day drawn upon you at 10 days' sight, in favour of Mr. R. B. *Edwards*, one draft for 5,000 dollars, which beg your usual care of. The bills now sent you are on account of a shipment of Sea Island cotton, to Mr. N. *Aspinall*, in the ship *Belvidera*, to sail on the 10th instant to *Liverpool*."

The draft in favour of *Edwards* mentioned in the above letter was regularly honoured and paid by the plaintiffs, and 5000 dollars was the amount of the value of the two bills drawn on the 8th *May*.

It did not appear at the trial how the two bills drawn on the 9th *May*, were transmitted by *Hindley* to the plaintiffs, but it was proved by *Hindley* that they were drawn on account of 71 bales of cotton bought by him on his own account, but to be consigned to the defendant, which was done; and that all those bills were on account of the 71 bales, but that he did not communicate to the plaintiffs that the 71 bales were bought on his own account; that the plaintiffs supposed they were bought on the defendant's account; and that he (*Hindley*) received full value from the plaintiffs by his drafts on them, long since due, for the four bills. Forty-seven of the bales of cotton per the *Belvidera* were sold for 1640*l.*; and 24 remained unsold at the time of the trial.

On the 15th *June*, 1822, after the plaintiffs had accepted the drafts upon them drawn by *Hindley* against those four bills, but before such bills were presented to the defendant for his acceptance, and his refusal thereof, the defendant addressed the following letter to the plaintiffs :—

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ASPINALL." *Liverpool*, 15th June, 1822.Messrs. *Ogden, Day, & Co.*

GENTLEMEN,

I am in possession of your esteemed favours of the 14th ult. The bills therein advised have been duly honoured. The state of our cotton market is very bad at present, and hopes of improvement are small. I calculated upon seeing Mr. *Hindley* by this time, but he has not yet made his appearance. On the receipt of the present, you will please to consider my letter to you of the 16th *October* last as no longer in effect. Should I make any new arrangement for the next season, I shall have pleasure in addressing you again. Begging the favour of an acknowledgment of this, I am, &c.,

(Signed)

Nicholas Aspinall."

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the amount of the two unpaid bills, or either of them. If the Court shall be of opinion that the plaintiffs are entitled to recover the amount of the 490*l.* bill, and not the amount of the 500*l.* bill, the verdict for the plaintiff is to stand for 490*l.*, and interest thereon. If the Court shall be of opinion that the plaintiffs are entitled to recover the amount of both the unpaid bills, the damages are to be increased to 990*l.* and interest thereon; and the plaintiffs are to have the benefit of the special counts, if the Court shall think them entitled thereto, upon the facts above stated. If the Court shall be of opinion that the plaintiffs are not entitled to recover at all, a nonsuit is to be entered.

Crompton, for the plaintiff. It will not be necessary to make any observations on the pleadings in this case; the question for the consideration of the Court depends entirely upon the effect of the correspondence between the parties, as set out in the special case. *Hindley* was partly the

partner, and partly the agent of the defendant. The letter of the 25th *October*, 1821, from the defendant to *Hindley*, authorises the latter to make purchases on the joint account of both, empowers him to raise money by drawing bills on the defendant "for any proportion of the shipments," and directs him particularly by what mode to raise such money, namely, "by passing his drafts through the northern cities upon the agents there." The shipment by the *Belvidera*, out of which the whole dispute arises, was, quoad the plaintiffs, a consignment from *Hindley* to the defendant, on account of the defendant; for though in point of fact it was an adventure made by *Hindley* on his own account and risk, the plaintiffs had no notice or knowledge that any person besides the defendant was interested in it. *Hindley*, therefore, in drawing the bills against that shipment, appeared to the plaintiffs, and the plaintiffs in honouring his drafts to the amount of those bills regarded and treated *Hindley*, as the agent of the defendant, merely: and, therefore, they are entitled to recover the amount of all those bills, if they did not exceed the limit of the guaranty given by the defendant to the plaintiffs; which they did not. Now the guaranty authorises the plaintiffs to honour *Hindley's* drafts to the amount of such bills as he may send to them for sale on the defendant's account, and engages that such bills shall be accepted and paid. It will be contended on the other side, that the words there, "on my account," have reference to the cotton and not to the bills, or at least, that they limit the plaintiffs' authority to the honouring *Hindley's* drafts in respect of such bills only as were drawn against shipments of cotton consigned to the defendant on his own sole account. But there is no pretence for such a construction of the guaranty. There is no expression in it which has any tendency to connect the bills to be drawn with the cotton to be shipped. The words, "on my account," plainly and exclusively apply to the bills and drafts which *Hindley* might draw, and not to the pur-

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chases or shipments which he might make. If the party guaranteed has acted within the limits and according to the instructions of the guaranty, the loss that has accrued must fall upon the party who gave the guaranty. Have the plaintiffs so acted? If the bills in question were in fact drawn on account of the defendant, or if they were sent to the plaintiffs, represented as being so drawn; in either of those cases the plaintiffs have acted within the terms of the guaranty, and are entitled to recover the amount of both the bills. Without struggling for the former proposition, it is enough to say, that both the bills in question were plainly represented to the plaintiffs as having been drawn by *Hindley* on account of the defendant. What distinction is there between the two bills in question? *Hindley* makes a purchase of cotton, which he consigns to the defendant. Against the consignment he draws four bills, two on the 8th, and two on the 9th *May*. One of the former is the 490*l.* bill in question. One of the latter is the 500*l.* bill in question. He sends all the four bills to the plaintiffs, and draws upon them for the value of them all, which they pay. The two drawn on the 8th *May*, he sends to the plaintiffs in a letter, saying, "inclosed you have my two bills on *Aspinall*, which you will negotiate—on account of the above bills I have drawn upon you for 5000 dollars—the bills are on account of a shipment of cotton to *Aspinall*, in the *Belvidera*." In what manner, or under what representation, he sent the two bills drawn on the 9th *May*, to the plaintiffs, or in what terms he drew upon them for their value, does not appear: but it was all one transaction; the bills were all drawn against one consignment; that consignment was represented to the plaintiffs as one made on account of the defendant by *Hindley*, as his agent: and therefore two of the bills being expressly described as drawn on account of the defendant, the plaintiffs were justified in supposing that the others were drawn on his account also, and in paying *Hindley's* draft for their value, on the defendant's

account. Besides, the defendant actually paid one of each of the two sets of bills, which was recognising the validity and correctness of all; and, therefore, it is now too late for him to contend that any of them were drawn without his authority.

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Tindal, contra. The plaintiffs had no authority under the defendant's letter of guaranty to pay *either* of the bills in question, and therefore they are not entitled to recover in this action. That letter begins by stating that the defendant had authorised *Hindley* to purchase cotton for him, and then adds, that, as it might be to the defendant's advantage to have *Hindley's* bills on him negotiated through the plaintiffs' house, he, *in such case*, requested them to honour *Hindley's* drafts to the amount of such bills as he might send to them for sale, *on his (the defendant's) account*. The whole of the letter, therefore, has reference to the introductory part of it, namely, that *Hindley* was employed to purchase cotton for the defendant, and the whole of the authority and guaranty given to the plaintiffs is, consequently, confined specifically to bills drawn by *Hindley*, in respect of consignments of cotton made by him on the defendant's account. Now, these were not such bills, therefore the plaintiffs had no authority to pay them. [*Bayley, J.* How was it possible for the plaintiffs to know on whose account the shipments were made, or the bills drawn? They could know only what *Hindley* chose to tell them, and he was the defendant's agent, and his representations bound his principal]. Even if the plaintiffs did not, or could not know, that the bills in question were not drawn on the defendant's account, still it by no means follows that the defendant is liable to the payment of those bills. They had better means of ascertaining that fact, than the defendant had of controlling the conduct of *Hindley*. The bills of lading must, or at least *might*, have passed through their hands; a sight of them would at once have shewn them that the

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bills were drawn against a shipment made on *Hindley's* own account, instead of the defendant's, and that therefore they ought not to pay those bills on the defendant's account; and as that source of information and guidance was within their power, it was their duty to have availed themselves of it. Besides, how can the plaintiffs recover upon this declaration? The special counts allege that the goods, in respect of which the bills were drawn, were purchased and shipped on account of the defendant, and that none of the bills were paid by the defendant; the evidence expressly disproved those allegations: therefore, they will not sustain the action. Neither will the money counts; for how is it possible to predicate of this transaction, either that the plaintiffs have paid money on account of the defendant, or that the defendant has received money to the use of the plaintiffs? [*Abbott, C. J.* May it not be predicated with truth that the plaintiffs have lent and advanced money to the defendant?] That would be equally inconsistent with the truth; because that must be done by the request of the defendant, and here there was no request, for the whole transaction was on the account and at the request of *Hindley*, and not of the defendant. At all events the plaintiffs can recover only for the bill which was described by *Hindley* in his letter to them, as drawn on account of the defendant, if that letter can be so construed; for as there is no evidence how the other bill got into their hands, nor upon whose account they were informed it was drawn, they must be taken to have paid that, at least, at their own risk, upon *Hindley's* account, without any reference to the defendant or his guaranty.

ABBOTT, C. J.—I am of opinion that the plaintiffs are entitled to recover to the extent of the amount of the bill for 490*l.*, drawn on the 8th of *May*, and the interest upon it; and no further. It has been urged in opposition to their recovering even so far, that it was the duty of the plaintiffs to ascertain and satisfy themselves as a matter of

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fact, that the bill was drawn in respect of cotton purchased for and on account of the defendant: and that the terms of the guaranty expressly impose upon them that duty. I think the guaranty will not admit of such a construction. The law does not require impossibilities of any man, and how was it possible for the plaintiffs, at a distance of 1,200 miles from *Hindley*, to know what was the real nature of the transactions he was engaged in, or to obtain any other description of the consignments, or the bills, than that which he thought proper to give them? They had no source of information but his letters; and if such a responsibility attached upon them, as has been contended for to-day, no man either could or would ever take upon himself the execution of a letter of credit, which would be a source of great inconvenience to the mercantile world. It does seem to me, however, that in order to sustain this action, the plaintiffs were bound to prove that the bills came into their hands in the regular and ordinary course of business from *Hindley*, and under his representation, that they were drawn to meet shipments made on account of the defendant. With respect to the bill of 490*l.*, they produced evidence to that extent, because the fact that it came to them inclosed in a letter from *Hindley*, and the contents of that letter, were quite sufficient to authorise them in believing that the bill was drawn on the defendant's account. But with respect to the bill for 500*l.*, drawn on the 9th of *May*, they produced no such evidence; and it may be perfectly consistent with all that is found in the special case, that *Hindley* may have obtained from the plaintiffs an advance of money upon that bill, without any reference to the former bill, or any connection with the transaction on account of which that was drawn. The plaintiffs have, in my opinion, failed in bringing the latter bill, and the advance made by them upon it, within the fair operation of the guaranty, and therefore are not entitled to recover in respect of it. Upon the whole, therefore, I am of opinion that the verdict

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found for the plaintiffs ought to stand for the amount of 490*l.* and interest, and no more.

BAYLEY, J.—I entirely agree with my Lord Chief Justice in the view which he has taken of this case. *Hindley* went out to *America* as the agent of the defendant and other persons. The defendant, among others, gave him a letter of credit upon the plaintiffs, and to the extent of that letter of credit, he bound himself by his acts. I think the proper construction of the guaranty is, that the defendant undertook to make himself liable for such sums as *Hindley* should obtain from the plaintiffs, upon bills which he represented to them as drawn on account of the defendant; and in point of law, I think he is liable to that extent. The bill for 490*l.*, drawn on the 8th of *May*, comes within that description, for *Hindley*'s letter clearly represents it as drawn on account of the defendant. But not so the bill for 500*l.*, drawn on the 9th of *May*, for there was no such letter or representation proved with respect to that, nor any evidence produced to shew, how it came into the plaintiff's hands, nor upon what understanding they advanced the money for it. If there was no such letter in existence, that bill does not come within the terms of the guaranty: and if there was, the only inference we can draw from its non-production is, that it contained something which would have led to a conclusion equally unfavourable to the plaintiff's claim.

HOLROYD, J., and LITTLEDALE, J., concurred.

Judgment for the plaintiff to the amount of 490*l.*
and interest.



WHITTAKER v. BRADLEY.

1826.
Saturday,
28th January.

CASE for words of and concerning the plaintiff as an inn-keeper: "He is a bankrupt; he will be in the *Gazette*, in twelve months; he is a pauper." Plea, the general issue, and verdict for the plaintiff at the sittings before *Abbott, C. J.*, in *London*, after last term.

Saying of an inn-keeper "he is a bankrupt, he will be in the *Gazette* in a twelvemonth; he is a pauper," is actionable, though he be not liable to the bankrupt laws.

Marryat now moved to arrest the judgment, upon the ground that an inn-keeper, as such, not being liable to the bankrupt laws, these words were not actionable, and he cited *Collis v. Malin (a)*, *Arundel v. Mare (b)*, *Anonymous (c)*, *Walgrave and Agars (d)*, *Emerson v. Fairfax (e)*.

ABBOTT, C. J. The single question is, whether language importing that a man who gets his living by buying liquors and other articles fit for the entertainment of man, and furnishes his house with them in order that he may be ready to supply his guests, is unable to pay his debts, are actionable; or, in other words, whether such a man may be prejudiced by slander of that description, he not being subject to the bankrupt laws. May not a man be as much prejudiced by such words as if he were actually subject to the bankrupt laws; if his credit be affected by such an imputation on his solvency? I think, according to all principle on which actions of slander lie, this action is maintainable, though the plaintiff be not liable to the statute concerning bankrupts.

BAYLEY, J. The principle on which this species of action is maintainable is, that the slander has the effect of producing temporal damage to the party complaining. It is upon this principle that an imputation of ignorance upon

(a) Cro. Car. 282.

(b) 1 Vin. Ab. 472.

(c) Bulst. 40.

(d) 1 Leon. 335.

(e) 1 Sid. 299.

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a counsellor or an attorney is actionable, because it has a tendency to prejudice him in his profession. So if a man seek his living by keeping an inn, is he not likely to be affected by an imputation upon his credit? In *Southam v. Allen* (a), the plaintiff being an inn-keeper, the defendant said of him, "deal not with him for he is broke, and there is neither entertainment for man or horse," and it was held that these words were actionable. Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade or business, are actionable. In *Reid v. Hudson* (b), the plaintiff being a laceman, declared in case for these words:—"You are a rascal, you are a pitiful sorry rascal, you are next door to breaking;" and being laid to have been spoken of the plaintiff in his trade, they were held actionable, without any averment of special damage.

HOLROYD, J., and LITLEDALE, J., concurred.

Rule refused.

(a) Sir T. Raym. 231.

(b) 1 Ld. Raym. 610.

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27th January.

DAFTER v. CRESSWELL.

48 A man rated on board an *East India* ship as a *seaman*, and who signs the ship's articles, and receives pay as such, is within the statute 2 Geo. 2, c. 36, and cannot maintain any action upon a *parol* agreement, subsequently made, for wages as *cuddy servant*, during the voyage.

ASSUMPSIT for wages owing to plaintiff from defendant, for the service of plaintiff, performed as the servant of defendant, in a ship whereof defendant was captain, during a voyage to the *East Indies* and back; with counts for work and labour, and the money counts. Plea, non assumpsit, and issue thereon. At the trial, before Abbott, C. J., at the adjourned *Middlesex* sittings after last term, it appeared that the action was brought to recover the

balance of certain wages which the defendant, as captain of the *East India* company's ship *Astell*, had agreed to pay the plaintiff, in consideration of his services as *cuddy* servant on board that ship, on a voyage from *England* to *Calcutta*, and back. The plaintiff had been regularly entered on the ship's books as a seaman, had received pay from the *East India* company as such, and in that character had signed the ship's articles in the usual course; but the agreement for wages as *cuddy* servant was merely verbal, no written contract having been entered into between the plaintiff and the defendant upon that subject. It was objected, upon this evidence, that the case was within the statute 2 Geo. 2, c. 36, which prohibits captains of ships to carry mariners to sea without first making an agreement in writing for their wages, and the action not maintainable; inasmuch as it had been decided, that a mariner could not recover any thing agreed to be given to him in reward for his service, which was not specified in the articles; and the case of *White v. Wilson* (a), was quoted as in point. On the other hand it was urged, that this being an action for wages as a servant only, and not brought by the plaintiff in the character of a seaman, was not within the operation of the statute, and no written agreement was necessary. The Lord Chief Justice was of opinion, that as the plaintiff was entered on the ship's books as a seaman, and had signed the ship's articles, and received pay, as such, he could be considered as a seaman only, and therefore could not maintain any action for wages not specified in the written agreement, and accordingly nonsuited the plaintiff, with leave, however, to move to enter a verdict for 10*l.*, that being the amount of damages agreed upon, provided the action was maintainable.

Gurney, now moved accordingly, and contended that the statute applied to seamen only, and affected such contracts only as were entered into by them in their character

(a) 1 B. & P. 216.

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of seamen. The present case, therefore, was not within the statute, because the contract upon which the action was brought, was not entered into by the plaintiff in his character of seaman, but as cuddy servant only; and the mere fact of his having entered into one contract as a seaman, could not control or override any agreement which he afterwards made in another character. *White v. Wilson* was distinguishable from the present case, because there the plaintiff was hired as mate of a vessel, and the agreement for the extra wages there claimed, was made with him in that character. He submitted, therefore, that the action was maintainable upon the parol agreement.

PER CURIAM.—The plaintiff was rated as a seaman, and signed the ship's articles, and received pay, in that character. By those acts he is concluded from saying that he was not a seaman, and from maintaining any action for any wages or reward not specified in the written contract. As a seaman, it was his duty, as it is of every seaman, to act as a servant, or to perform any honest service, at the command of the captain; and the fact of the agreement upon which he has sued being entered into by him in the character of a servant, and not of a seaman, will make no difference, and will not take the case out of the operation of the statute. The nonsuit, therefore, was clearly right.

Rule refused (a).

(a) See *Abbott on Shipping*, 458 et seq; and the cases there collected.



GEARY v. PHYSIC.

1826.
Friday,
February 3.

ASSUMPSIT by the indorsee, against the maker of a promissory note for 30*l*. Plea, the general issue. At the trial before *Abbott*, C. J., at the *London* adjourned sittings after last *Hilary* term, when the note in question was given in evidence, it appeared to have been indorsed by one *Kemp*, the payee to the plaintiff, by writing his name thereon with a *black lead pencil* instead of *ink*; whereupon it was objected, first, that this was not such a mode of writing as the law would recognize, and therefore, that the plaintiff had no title to the note by indorsement; and second, that supposing it could be considered as an indorsement in writing, yet it was not an indorsement according to the usage and custom of merchants. The learned judge over-ruled both objections, and the plaintiff had a verdict, with liberty, however, to the defendant to move to enter a nonsuit. In *Easter* term last, a rule nisi was granted accordingly, the Court yielding to the application with considerable reluctance.

An indorsement written on a promissory note, with a *black lead pencil* instead of *ink*, is a writing in law, and gives the indorsee a right to recover upon the note in a court of law.

The tiger now shewed cause. It cannot be denied that the indorsement in question is in fact a writing; and if so, there is no authority in law which requires that such a writing shall be made with ink or any other specified material. For all the purposes to which such an instrument as this is usually applied, an indorsement in pencil is sufficiently permanent, because bills of exchange and promissory notes are used only for temporary occasions. The authority of Lord *Coke* (a), as to the materials on which a deed is to be written, is inapplicable to the present case. A deed is intended to perpetuate the memory of the most solemn transactions of life, and therefore requires that it should be composed of the most imperishable materials; but not so

(a) Co. Litt. 229. Fitz. N. B. 122. 2 Bl. Com. 297.

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of a negotiable mercantile instrument, which is intended for circulation during a short period of time. But even though it be said by Lord *Coke* that a deed must be *written* on paper or parchment, it does not necessarily follow, that the writing may not be made with any other material than ink. For the ordinary purposes of mankind, a writing in *pencil*, as evidence of the *intention* of the party to bind himself, is as effectual for that purpose as any more imperishable substance (*a*), and there is no authority to be found, which requires that the indorsement or the signature to a bill of exchange or other negotiable security, shall be written in ink. It seems to be clear, that a memorandum in writing, if written only with a pencil, would be sufficient to satisfy the Statute of Frauds. In *Jeffery v. Walton* (*b*), Lord *Ellenborough* received in evidence a memorandum of a contract for the hire of a horse, written in pencil, and it was not questioned that the writing was such as the law would recognize as evidence of the intention of the parties. *Schneider v. Norris* (*c*), is an authority to shew that a bill of parcels in which the name of the vendor is *printed*, and that of the vendee *written*, by the vendor, is a sufficient memorandum of the contract within the Statute of Frauds, to charge the vendor. It is every day's practice at Nisi Prius, to give in evidence memorandums of accounts written in pencil, and nobody ever made any objection that they should be written in ink, to render them legal evidence. But even in the Ecclesiastical Courts, where a question arose as to the validity of a codicil altered in pencil, such an alteration was admitted as evidence of the deliberate intention of the party; *Dickenson v. Dickenson* (*d*). So here the indorsement in question must be received as evidence of the deliberate intention of the defendant to bind himself. Could it be doubted that a forgery of the indorsement of such an instrument in pencil, would be a capital offence. If not, then this must be considered, first

(*a*) 2 Phil. Ev. 173.(*c*) 2 M. & S. 286.(*b*) 1 Stark. N. P. C. 167.(*d*) 2 Phil. Rep. 173.

as a writing which the law will recognize ; and second, as an indorsement according to the custom of merchants, inasmuch as that custom is silent as to the manner in which writings of this description shall be made.

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F. Pollock, contra. If marking with a pencil can be considered as a legal mode of *writing*, it must be held to be so for all purposes, and in all transactions between man and man, where written evidence is requisite. So extensive a proposition might be attended with the most dangerous consequences ; for it must be held, not only that bills of exchange and promissory notes, but wills, deeds, and other solemn instruments, would be valid and binding, though not written in ink. Such a decision would afford great facility to fraud and forgery. The first question then is, what is the *legal* meaning of the word *writing* ; and it is submitted that a writing to be valid and effectual in the law, must be composed with ink, or other equally permanent material. This is the first time the question has ever come before a court of common law, and though the point was considered in the Ecclesiastical Courts, with reference to the alteration of a codicil in pencil, and it was ruled to be merely evidence of deliberate intention, yet it is submitted, that the intention of the writer is out of the question as to the legal meaning of the word *writing*. If a court of law decides this to be a writing for this purpose, it must be considered as a mode of writing for all purposes. [*Abbott, C. J.* It does not follow that because we should hold this to be a writing in this particular case, that we should hold it to be a legal mode of writing on every occasion]. The amount of the note in question is small, but the same argument would apply if it were fifty times the sum. The cases cited on the other side do not help the argument for the plaintiff ; because though a memorandum written in pencil, or an instrument partly written, and the rest printed, might be very good evidence to satisfy the Statute of Frauds ; it does not therefore follow that it would be

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sufficient to satisfy the requisites of a bill of exchange, or promissory note, which are solemn negotiable instruments, requiring to be composed of imperishable materials, or such as are not liable to alteration or obliteration. But, secondly, assuming that this is a legal writing, still this is not an indorsement according to the custom of merchants, which is the very foundation of an instrument of this kind. The custom of merchants requires that indorsements of this kind shall be written in ink, and this being a mode of writing directly at variance with that custom, cannot prevail in a court of law.

ABBOTT, C. J.—It is clear that there is no decided authority which requires us to hold that all writings must by law be composed with ink; and therefore I cannot say that this indorsement, from the mere circumstance of its being written in pencil, shall not be valid and binding in a court of law. I think there is no danger that our decision in favour of this plaintiff will lead to many examples of the like kind, for the imperfection of this mode of writing, and the liability to which it is subject, of being obliterated and lost, will induce people, in general, to take care to have indorsements 'on such securities, written in ink. There may be particular occasions when ink is not accessible to parties taking such securities, and it would be extremely unjust to say, that nothing but ink shall be binding under such circumstances. As there is no rule of law which requires the indorsement upon a promissory note not to be written in ink, I am bound to hold that this action is maintainable.

BAYLEY, J.—I am of the same opinion. Writing in pencil admits of the same evidence of character and identity, as writing in ink requires. Instruments of this kind are generally intended for circulation during a short period of time, and the hand-writing upon them is susceptible of evidence by living witnesses. The different statutes which

speak of the usage and custom of merchants stand on the same footing. The statute 3 and 4 *Anne*, c. 9, speaks of promissory notes as being merely instruments in writing, and the indorsements as being merely in *writing*, and I cannot say that a writing in pencil is not a writing within the meaning of that statute.

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HOLROYD, J.—I think an indorsement in pencil is a writing, and that we are bound to consider it as a writing within the custom of merchants; for though the custom of merchants requires the indorsement to be *in writing*, in order to render the instrument negotiable or assignable over, yet it does not express the mode in which the writing is to be executed. The only authorities I know of, with regard to the particular mode of executing instruments, are those which relate to the execution of deeds. The law requires that a deed shall be made on paper or parchment, and if it be written on stone, board, linen, leather, or the like, it is no deed (*a*); but even there nothing is said whether the writing is to be in ink, or other material more or less durable. We need be under no apprehension that our decision in favour of this plaintiff, will dispose people to take bills of exchange or promissory notes written with less durable materials than are in general use. This case, it is true, does not arise directly on the custom of merchants, but rather on the statute 3 and 4 *Anne* c. 9, which provides, that promissory notes in writing shall be indorsed over in the same manner, and shall be put on the same footing with bills of exchange. The custom of merchants certainly comes in aid of the present case, for a bill of exchange, if it be *in writing*, is a valid instrument, and there is no exception that I am aware of in the custom, which says, that a pencil writing shall not be binding. So that if the custom of merchants is resorted to for the purpose of determining the question; this comes within the general description of an indorsement in writing, and must

(*a*) Co. Litt. 229.

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be considered as within the custom, and therefore binding on the party making it.

LITTLEDALE, J., was absent.

Rule discharged.

The KING v. The JUSTICES of ESSEX.

A notice of appeal by an inhabitant of a parish, against an order for stopping up an unnecessary public footway under the authority of 55 Geo. 3, c. 68, s. 2, must state that the appellant is "injured" or "aggrieved," pursuing the language of s. 3, the appeal clause, or the party will have no *locus standi* in *curia*.

THIS was a rule nisi for a mandamus to the justices of Essex, commanding them to enter continuances and hear the appeal of *George Frost*, against an order made under the 55 Geo. 3, c. 68, s. 2, for diverting and turning an unnecessary public footway in the parish of *Mountnessing* in the same county. Mr. *Frost*, who is an inhabitant of *Mountnessing*, had, as soon as the order in question was made, given notice to the surveyor of the highways of his intention to appeal at the *Epiphany* quarter sessions now last past, against the said order, and had also affixed a similar notice on the church door, pursuant to the 3d section of the statute. When the appeal came on to be heard at the sessions, it was objected to the form of the appellant's notice, that he did not therein state himself to be *injured* or *aggrieved* by the order, conformably to the language of the appeal clause, sec. 3 (a). The sessions

(a) Which provides, "that where any unnecessary highway, bridleway, or footway, shall be so ordered to be stopped up as aforesaid, it shall and may be lawful for any person or persons *injured* or *aggrieved* by any such order or proceeding, &c., to make his or their complaint thereof, by appeal to the justices of the peace at the said quarter sessions, upon giving ten days' notice in writing of such appeal to the surveyor of the highways of the parish, township, or place wherein such highway, bridle or footway, shall be situated; and also affixing such notice to the door of the church or chapel of such parish, township, or place, and the said court of quarter sessions is hereby authorized and empowered to hear, and finally determine such appeal."


acquiesced in the objection, and dismissed the appeal; and the question now was, whether it was necessary for the appellant to aver in express terms in his notice, that he was a party "injured" or "aggrieved," in order to give him a locus standi to be heard at the sessions, he being in fact an inhabitant of the parish, and it being conceded that the path ordered to be stopped up, was a public footway.

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Knor and *Brodrick* shewed cause against the rule. The right of appealing to the sessions against an order for diverting and turning an unnecessary footway is given only to persons "injured" or "aggrieved" by such order. Unless, therefore, the party intending to appeal states in express terms in his notice that he is injured or aggrieved by the order of which he complains, he has no right to be heard, and the sessions have no jurisdiction to entertain his appeal. This is not an objection of mere form, it is matter of substance, inasmuch as the party is bound to aver on the face of his notice that he is injured or aggrieved, so as to call upon the respondents to support the order. The appellant in this case may be a mere volunteer, who has sustained no injury or grievance by the order in question. To such a person no right of appeal is given; and therefore, unless he condescends to state in his notice, pursuant to the express language of the 3d section of the statute, that he is "injured" or "aggrieved," the sessions are justified in refusing to hear him. It is not contended that an appellant under this statute is bound to set forth the grounds of his appeal, but he is at least required to shew that he has something to complain of, before he can bring the respondents into court.

Jessopp and *Dowling*, contra. *Primâ facie* every person is aggrieved by the stopping up of a public footway, and therefore, under the 3d section of this act, a notice complaining of such a proceeding, would be sufficient to entitle a party to be heard, without stating in terms that he

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was injured or aggrieved. It cannot be assumed that the appellant in this case was a mere volunteer in instituting an appeal, which if it failed, must have subjected him to the payment of costs. The bare fact of his appealing is strong evidence not only of his sincerity in the proceeding, but of his being really aggrieved by the order of which he complained. Whether he be or be not injured or aggrieved is matter of evidence to be established on the hearing of the appeal, the sessions alone being the competent tribunal to determine that question. A party may erroneously suppose himself to be injured or aggrieved, and therefore his own assertion in his notice to that effect can avail him nothing, unless he proves in evidence that he has sustained some injury. It is sufficient in a proceeding of this nature, where the public interest may be seriously affected by an order made *ex parte* by the petty sessions, for any inhabitant of the parish to give notice that he intends to appeal at the sessions against the order, and when the sessions arrive it is time enough for him to shew by evidence that he is injured or aggrieved. This act does not describe any form of notice of appeal similar to that which is given in the schedule to the General Highway Act 13 Geo. 3, c. 78, and therefore the appellant is left to draw his notice of appeal in such form as he pleases; and so long as he appears to be a party complaining, which is evidenced by the fact of his appealing, that is sufficient to give the sessions jurisdiction. If this objection to the notice could prevail, it might as well be contended that the party was bound to set out the grounds of his appeal, and the cause and matter thereof, in like manner as in appeals in matters of bastardy, under 49 Geo. 3, c. 68, s. 5 (a), or against overseers' accounts, under 41 Geo. 3, c. 23, s. 4 (b); but it has been holden that the grounds of appeal need not be stated in the notice, *Rex v. Justices of Devonshire* (c).

(a) See *Rex v. Justices of Oxfordshire*, ante. vol. ii. 426. 1 B. & C. 279, S. C.

(b) See *Rex v. Mayall*, ante vol. iii. 383, and *Rex v. Sheard*, ante vol. iv. 480. 2 B. & C. 356, S. C.

(c) 1 M. & S. 411.

ABBOTT, C. J.—This question arises upon the language of the clause (s. 3) in the 55 Geo. 3, c. 68, which gives the appeal. That clause provides that it shall be lawful for any person or persons *injured* or *aggrieved* by any of the proceedings therein mentioned, to make his or their complaint thereof by appeal to the quarter sessions, upon giving ten days' notice in writing to the surveyor of the highways, &c. It is objected, that the notice of appeal in this instance did not describe the appellant as a party "injured" or "aggrieved," but simply stated him to be an inhabitant residing in the parish; and on that ground the sessions dismissed the appeal. I am of opinion that the sessions have done right. It is not contended that the notice should contain the specific grounds on which the party means to rely in support of his appeal; but it is very reasonably insisted that the notice should contain a statement, at least, that the party appealing had some grievance or injury to complain of. Some acts of parliament, and particularly those adverted to in argument, expressly require that the party complaining shall state the grounds of his appeal, and the cause and matter thereof. In this case that is not required; but it is of great importance, that in a proceeding of this nature, the object of which is to bring the respondent into court, the party should shew on the face of his notice, that he has a locus standi to be heard. A notice of this kind is in the nature of a declaration, or an indictment, in which the party must shew that he is entitled to call upon the Court to interfere. Unless, therefore, an appeal is given to all mankind, I cannot say that the mere circumstance of this person being an inhabitant of the parish, and one of the public, is sufficient to entitle him to be heard as an appellant, without stating at the same time that he is a person actually injured or aggrieved. The appeal is given only to persons "injured," or "aggrieved," and as this person does not say that he is injured or aggrieved, it appears to me that he had no right to be heard. The schedule to the 13 Geo.

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3, c. 78, gives a form of notice, in which the appellant is required to assign the grievance and cause of complaint. In the 55 Geo. 3, no such form is prescribed, and therefore it would have been sufficient if this appellant had complied with the 3d section, which gives the appeal to the party "injured" or "aggrieved." It is said, that this being a question respecting a *public highway*, all his majesty's subjects are likely to have an interest in it, and that as the act gives an appeal to all persons injured or aggrieved, it follows that all mankind have a right of appeal. Now we must suppose that the appeal clause, in using the words "injured or aggrieved," has reference to those only who have some special interest in the matter, by living near the foot path proposed to be diverted, or having occasion frequently to use it. It does not follow, because an inhabitant of a parish may have occasion to use an unnecessary foot path sometimes, that by stopping it up he would thereby be injured or aggrieved. The act clearly contemplates persons likely to sustain some real injury, and does not give the appeal to the world at large, or to any captious or quarrelsome person in a parish who may be displeased with the stoppage. We think that some meaning must be attached to the words "injured or aggrieved," and as this appellant has not brought himself within those terms, on the face of his notice, by alleging that he has sustained a special injury, we are of opinion that this rule must be discharged.

HOLROYD, J. (a), and LITLEDALE, J., concurred.

Rule discharged.

(a) BAYLEY, J., was absent.



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The KING v. ABRAHAM CONSTABLE, Esq.

THE defendant, a justice of the peace, had been convicted upon an indictment for a misdemeanour in his office, in having committed a person for punishment to the house of correction, there to be kept to hard labour for three months, under the Vagrant Act, 5 Geo. 4, c. 8, s. 2, without having examined the witnesses on oath; heard the accused in his defence, or having even seen him before the warrant of commitment was signed.

A justice convicted of a misdemeanour in his office, must attend in person to receive the judgment of the Court; but upon an affidavit of age and infirmity, the Court will dispense with his personal attendance.

The Attorney General (Sir J. Copley), having prayed the judgment of the Court,

Scarlett and *Marryat*, for the defendant, moved that his personal attendance might be dispensed with on the ground of age and infirmity.

The Attorney General objected to this application without some special grounds stated on affidavit; and he cited *Rex v. Harwood* (a). There the defendant, being a justice of peace, was convicted on an information, for a conviction by him made, of an alehouse keeper, who was never summoned or heard. It was moved, as of course, to dispense with his appearance. This was opposed, unless there was some reason given or affidavit made; and the Court resolved that it was not of course, and the defendant afterwards appeared in person.

The Court said the defendant must appear in person, unless some reason for his absence was assigned on affidavit.

On a subsequent day, an affidavit made by the defendant's medical attendant was produced, from which it appeared that the defendant was upwards of 80 years of age, extremely infirm in health, and could not, in the

(a) 2 Str. 1088. 3 Burr. 1716, S. C.

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judgment of the deponent, leave his house without danger to his life.

Upon this affidavit, the Court determined to dispense with the personal attendance of the defendant, and the matter was disposed of in his absence. The nature and circumstances of the case will be sufficiently disclosed in the judgment, which was pronounced as follows, by

ABBOTT, C. J.—It is extremely painful to the Court to be called upon to pass a judgment against a defendant arrived at the very advanced age of this gentleman, and who has for many years been acting in the discharge of the important office of a magistrate and justice of the peace ; but although it is painful to us to pass a judgment, under such circumstances, yet is our duty so to do. The offence of which this defendant has been found guilty, is not charged to have been committed with any corrupt motives, nor does it appear from the evidence that he had any feeling of personal animosity towards the party who was the object of his commitment, and who has certainly suffered very severely under it. But notwithstanding the absence of corrupt motives, and of personal animosity, the circumstance of committing a man to hard labour for three months, without the examination of a single witness against him on oath, or without giving him the opportunity of saying one word in his defence, is a very serious offence in a magistrate. The Court is at a loss to understand how any person who had so long acted as a magistrate, could have fallen into such an error, as to suppose that he was at liberty to sign depositions, importing that they had been taken on oath before him, when in fact, they were not so sworn ; and to sign a warrant of commitment, without hearing the accused, or even seeing him before he was consigned to prison. Such a proceeding, was not only highly irregular, but grievously prejudicial to the party committed. It appears, however, that the defendant has done all that he could do, to satisfy the injured party,

and it is now sworn that he has succeeded in that object. We are, therefore, not called upon to inflict any sentence with a view to the interest or to the feelings of the person who has been injured. Those have already been satisfied by the defendant himself. One object which may well be supposed to have been in view on the part of those who instituted this prosecution, (and a very proper object it was), has been attained, namely, a desire expressed by this gentleman, to withdraw from the commission of the peace, in which, certainly, after what has happened, he ought no longer to remain. That is to a certain degree an atonement, and considering all that he has done in the way of satisfaction to the injured party, we do not feel ourselves called upon to pass such a sentence as will bear heavy upon the defendant. Taking all the circumstances of the case into consideration, we think it will be sufficient to pronounce a rule, that the defendant do pay to the king a fine of 100/.

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INDICTMENT for perjury. The first count, after setting out in the introductory part, that one *I. H.* was in due form of law tried upon a certain indictment for election bribery, proceeded to charge, "that *I. R.*, (the defendant) gave false testimony," without averring that the offence was "*wilfully*" or that it was "*corruptly*" committed, is bad in arrest of judgment.

An indictment for perjury, charging that the defendant "*falsely and maliciously*"

Quære, Whether an indictment at common law for perjury, must not charge the offence to have been *wilfully*, as well as *corruptly*, committed.

The first count of an indictment for perjury committed on a trial, having charged that the defendant was sworn and examined at the trial, that he deposed so and so, setting out the evidence, and then assigning perjury thereon, in the usual way; the fifth count, which assigned perjury on an affidavit sworn by the defendant in opposition to a rule for a new trial in the previous case, after averring by way of introduction, "that by means of the false testimony of the defendant in the first count mentioned, the prosecutor was unlawfully convicted," proceeded to allege that the defendant afterwards falsely swore in the affidavit, "that the evidence which he had given on the said trial was true;" and then assigned the perjury by averring "that whereas in truth and in fact, the evidence which the defendant gave on the said trial was not true, but was false in the particulars in the said first count of this inquisition assigned and set forth:"—Held insupportable in arrest of judgment.

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fendant), late of, &c., labourer, wickedly devising and intending to injure and aggrieve the said *I. H.*, and to cause him to be wrongfully convicted of the offences hereinbefore mentioned, and to subject him to the pains and penalties by the laws of this realm inflicted on persons guilty thereof, on, &c., at, &c., did, at the trial of the said indictment, appear as a witness against the said *I. H.*, and was then and there sworn, &c., to speak the truth concerning the matters then and there depending, &c., and the said *I. R.* then and there *falsely and maliciously gave false testimony* against the said *I. H.*, in support of the said matters so charged against the said *I. H.*, in the said indictment as aforesaid, by then and there *falsely deposing* and giving in evidence at the said trial, in substance and in effect, that, &c., [setting forth the evidence upon which the perjury was assigned], which said testimony, and which said matters, so sworn and deposed by the said *I. R.*, as aforesaid, were material upon the trial of the said indictment; whereas, in truth and in fact, &c., [assigning perjury on the evidence previously set out]. And so the jurors, &c., say that the said *I. R.* *did in manner and form aforesaid, commit wilful and corrupt perjury.*" Second, third, and fourth counts, more general, but respectively charging the perjury in the same manner as in the first count. The fifth and last count, after averring, by way of introduction, that at the trial of the said indictment, the said *I. H.*, by means of the false and material testimony of the said *I. R.*, in the first count mentioned, was unlawfully and untruly found guilty of the offences charged against him, proceeded to allege, that afterwards, to wit, on, &c., the court of King's Bench granted a rule nisi for a new trial, of which rule the said *I. R.* had notice, and that having had such notice, but minding and wickedly imagining, devising, and intending by falsehood and wicked means to prevent and hinder the said rule from being made absolute; and to cause and to procure the same to be discharged, and to prevent justice

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and to pervert the due course of law, and also to vex, harass, aggrieve, and oppress the said *I. H.*; afterwards, to wit, on, &c., at, &c., the said *I. R.* came in his own person before *W. E. W. T.*, (a commissioner duly authorized to take and receive affidavits), and was then and there duly sworn, &c., and being so sworn, "*knowingly, falsely, wickedly, wilfully, and corruptly,*" did then and there, before the said *W. E. W. T.*, &c., depose, swear, and make affidavit in writing, (amongst other things), *in substance and in effect, that the evidence which he the said I. R. had given on the said trial was true; whereas in truth and in fact, the evidence which the said I. R. had given in the said trial was not true, but was false in the particulars, in the said first count of this inquisition, assigned and set forth, and which said particulars were then and there material in respect of the said indictment and of the said rule, to wit, at, &c., and so the jurors, &c., say that the said I. R., on, &c., at, &c., before the said W. E. W. T., &c., did in manner and form last aforesaid, commit wilful and corrupt perjury, &c."* At the trial before *Burrough, J.*, at the last spring assizes for the county of *Cornwall*, the defendant was found guilty, and in *Easter* term last, a rule nisi was granted to arrest the judgment, on two grounds; first, that the first four counts of the indictment only charged the alleged perjury to have been committed "*falsely and maliciously,*" omitting the words "*wilfully, corruptly, and knowingly,*" which were essential to constitute the legal crime of perjury; and second, that the fifth count was bad and informal, by referring merely to the assignments of perjury charged in the first count, instead of distinctly setting out in what particulars the defendant was supposed to have committed perjury.


Wilde, Serjt., and *Manning*, now shewed cause. It is conceded that every offence which a defendant is called upon to answer, must be charged with precision and cer-

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tainty, and it is submitted that the crime of perjury is well charged by this indictment. As to the first objection, this being an indictment at common law, there is no precise technical form of words in which the offence must necessarily be charged. It is sufficient if the words are sufficient to give a character of guilt to the act which is charged to amount to perjury; and the question here is, whether there is enough on the face of the first four counts, and giving effect to all the words used, to charge the defendant with having knowingly given false evidence. The defendant is charged with having falsely and maliciously given "false testimony." The word "maliciously" *ex vi termini*, imports a bad, wicked, and corrupt motive; and it is scarcely possible to understand the words in which the offence is here charged, without giving them the same force which the most technical certainty would express. Where a person is charged with having intended to obtain an unjust conviction of another, and it is alleged that he sought to fulfil his intention by giving "false and malicious testimony," the word "malicious," there, imports the whole guilt of perjury contemplated by the law. [*Bayley, J.* Does the word "malicious," necessarily imply "wilfulness and corruption?"] In the sense in which it is here used, when coupled with the purpose charged, it is impossible to understand it in any other sense. The case of *Rex v. Harris (a)*, is not an authority in favour of the objection; if any thing, it is against it; for there the words "wilfully and corruptly," were omitted, and the point there decided was only this, that where a defendant is charged with having taken one oath at one time, and another at a different period, when he swore directly the contrary, it was necessary to allege which of the two oaths was false. Now here the defendant being charged with having *falsely* and *maliciously* given *false* testimony, for the purpose charged in the indictment, it is equivalent to a charge that he *corruptly*

(a) Ante, vol. i. 578. 5 B. & A. 926, S. C.

and *wilfully* gave false testimony. The word “maliciously” must be understood, not in its *English*, but according to its *Latin* meaning, and taking it so, it means not only malice in its ordinary acceptation, but also falsehood. Upon this point they cited *Com. Dig. tit. Justice of Peace*, B. 102; *Rex v. Greepe (a)*, 3 *Inst.* 164; and *Law Lexicon*, “*Malitiose*.” Then as to the fifth and last count, it is unnecessary in a subsequent count, either of a declaration or of an indictment, to repeat what has been expressly alleged in the first; provided there are words of reference to what has been previously set forth. Here the defendant is charged with having “knowingly, falsely, wickedly, wilfully, and corruptly deposed in his affidavit, that the evidence which he had given on the previous trial was true, whereas in truth it was false *in the particulars in the first count, assigned and set forth*.” Now it must be taken, that the falsehoods here assigned, are the same identical falsehoods which are assigned as perjury in the first count of the indictment. There was no necessity to repeat what had been previously alleged, and there being a distinct averment that the defendant committed the perjury in the particulars there assigned, it is submitted that this count is free from objection.

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C. F. Williams, R. Bayly, and Carter, contra. It is a clear proposition of law, that no man is to be drawn into a constructive perjury, and that whether the offence be prosecuted at common law, or on the statute, that can make no difference as to the certainty of the charge; *Rex v. Greepe (b)*. Now as to the mode in which the perjury is charged in the first four counts of this indictment, it is without precedent. No intendment can supply the want of the words “wilfully and corruptly,” or “knowingly;” and unless the perjury is charged to have been wilful and corrupt, the indictment cannot be supported. In *Tremaine’s Entries* there are no less than fifteen precedents of
 (a) 2 Salk. 513. (b) 2 Salk. 513. See *Rex v. Aylett*, 1 T. R. 69.

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indictments for perjury, and in none of them, except one, are the words "wilfully and corruptly," left out. It has been expressly decided that one of these words, at least, if not both, is absolutely necessary to a charge of perjury. In *Rex v. Cor* (a), which was an indictment on the statute, the words were "falsely, maliciously, wickedly, and corruptly," and it being objected that the indictment was bad, in not having stated that the offence had been committed *wilfully*, a case was reserved for the judges. Ten of the judges were unanimously of opinion "that in an indictment for perjury on the 5 *Eliz.*, c. 9, the word *wilfully* is essential, and must be inserted; because the term *wilful*, in the statute, is a material description of the offence; but that it is not necessary in the present case; for the indictment being at common law, and not on the statute, the words *falsely, maliciously, wickedly, and corruptly*, imply that the offence was committed *wilfully* (b). According to Mr. Justice *Blackstone's* definition, the perjury must be "wilful, false, and corrupt;" and every authentic precedent runs in this form. It is clear that "falsely and maliciously," alone, is not sufficient, for a man may tell the truth with a malicious intent. To convict him of perjury, it must be charged "wilfully and corruptly." Then the last count wants almost every requisite to bring the defendant within the pains and penalties of perjury. It is nowhere charged in that count, that the defendant had given any evidence on the former trial. His attention is not called to the particular parts of the evidence supposed to be false, and though it in general terms alleges the materiality of the evidence, yet it does not state what part was false, which is essential to such an indictment. The defendant cannot be convicted by reference and intendment, of what is stated and set forth in a distinct and separate count. As therefore the per-

(a) *Leach's Cr. Ca.* 71.

(b) *Vide Het.* 12. *Cro. Eliz.* 147, 201. 2 *Hale*, 169, 172, 184, 187. *Show.* 190. 3 *Inst.* 167. 2 *Haw. P. C.* 258, 326.

jury is assigned in none of the counts with legal and technical certainty, the judgment must be arrested.

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ABBOTT, C. J.—I am of opinion that the rule nisi for arresting the judgment must be made absolute. As to the first four counts, the objection is, that they do not charge that the defendant swore “wilfully and corruptly,” but merely that he swore “falsely and maliciously.” Now, according to every definition, the offence of perjury consists in swearing to some matter which is untrue, “wilfully and corruptly.” Whether the word “maliciously” may supply the place of one or other of these words, it is not necessary, in the present case, expressly to decide, because this indictment contains neither; but the case of *Rex v. Cox*, is an express authority to shew, that without one or the other, an indictment for perjury cannot be sustained. It still remains a question, whether the use of one, in the absence of the other, would be sufficient. Then, as to the last count, it is certainly framed in a very novel form. The perjury intended to be therein alleged, is supposed to have been committed in an affidavit made in this Court; and that affidavit having stated that what the defendant had sworn on some former trial was true, the fifth count had for its object, to shew, that what the defendant swore at that former trial was not true, but wilfully and corruptly false. Now the first step in the ordinary course of an indictment for perjury of this kind, is to charge that there had been a trial, and that the defendant was sworn and examined as a witness on that trial. The second step is to charge that being so examined, he swore and deposed to such matters, setting them out; and the third is to charge that the matters so sworn, were false and untrue, in the usual way. Here there is no averment that the defendant was sworn at the former trial; and the fact of his having been sworn at all on that trial is only to be taken by intendment, and by reference to the first count of the indictment. It merely states by

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way of introduction, that *I. H.* had "by means of the false and material testimony of the said defendant in the first count mentioned," been unlawfully and untruly found guilty. Now that is a very loose assertion that the defendant had been sworn on that trial. It is not an averment of fact, that he was sworn, and gave testimony. To give effect to the object of the count, it ought to have been distinctly averred that the defendant had been examined as a witness on oath, and that he had on such examination sworn to such and such facts. I think that if we were to take all this by intendment, as we are here desired to do, we should be establishing as a precedent a very loose and inefficient mode of charging perjury—a very great and serious offence, and which has hitherto been required to be charged with great precision and certainty.


BAYLEY, J.—I have no doubt as to the validity of the first objection. I did for some time entertain a difficulty upon the fifth count, but I now think it is insufficient. I think also that the assignments of perjury in the first four counts are not free from objection; they are very loosely charged (*a*).

LITLEDALE, J., concurred.

Rule absolute for arresting the judgment.

(*a*) HOLROYD, J., was absent.

The like decision, for the same reasons, was given in another case against a defendant named *Stevens*, under precisely similar circumstances.



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The KING v. J. S. S. COOKE and others.

THIS was an indictment against *James Stamp Sutton Cooke, Richard Stafford Cooke, Richard Jenkinson, and R. H. Mills*, for conspiring together, "with divers other persons to the jurors unknown," to injure and aggrieve Sir *George Jerningham*, bart., by the means, and in the manner set forth in the indictment. The defendants, *J. S. S. Cooke* and *R. Jenkinson*, severally pleaded not guilty. The defendant *Mills* had not appeared to the indictment, and *R. S. Cooke* pleaded peerage in abatement. To this plea there was a demurrer, and judgment afterwards given of respondeat ouster (a). Pending the proceedings on this plea, the record was taken down against the other two defendants who had appeared and pleaded not guilty, and at the trial before *Park, J.*, at the *Lent* assizes for the county of *Gloucester*, 1824, the jury acquitted *Jenkinson*, and found *J. S. S. Cooke* "guilty of conspiring with his brother *Richard Stafford Cooke*." Since the conviction, the defendant *R. S. Cooke*, had pleaded over to the indictment. In *Michaelmas* term last, *Campbell* obtained a rule to shew cause why the judgment against *J. S. S. Cooke* should not be arrested, or, at least suspended, until *Richard Stafford Cooke* should have been brought to trial, on the ground, first, that this was in effect a conviction of one individual of a conspiracy, which could not by law be supported; and second, that *R. S. Cooke*, with whom *J. S. S. Cooke* was convicted of conspiring, might hereafter be tried and acquitted, in which case, *J. S. S. Cooke* also would be entitled to a verdict of not guilty. He cited *Rex v. Kinnersley* and *Moore* (b), *Regina v. Herne* (c), *Rex v. Nicolls* (d), and *Rex v. Scott* and *Hams* (e).

Indictment against *A.*, *B.*, *C.*, and *D.*, for a conspiracy, charging that they conspired together, with divers other persons unknown. *A.* and *B.* were tried. *A.* was found "not guilty," and *B.* was found "guilty of conspiring with *C.*"—*C.* had pleaded before the trial of *A.* and *B.*; but neither he nor *D.* appeared to take their trials. On motion to arrest the judgment against *B.*, or to suspend it until *C.* should be tried:—Held, that the verdict was conclusive against *B.*, as a general verdict of guilty; and that judgment might be given against him, without reference to what the verdict might be on the trial of *C.*

(a) *Rex v. Cooke*, ante vol. iv. pp. 114 and 592.

(b) 1 Str. 193.

(c) 1 Str. 195, cited.

(d) 2 Str. 1297.

(e) 3 Burr. 1222.


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Taunton, Russell, and Talfourd, now shewed cause. The cases cited when this rule was obtained, are all authorities against the motion. In *Rex v. Kinnersley and Moore* it was expressly held that where two are indicted for conspiring together, and one only is tried and convicted, judgment may be given against him, before the trial of the other. In *Rex v. Nicolls* it was expressly held that one conspirator may be convicted after the other is dead; "exception was taken," says the reporter, "that one alone cannot be guilty of a conspiracy, and here is but one convicted: but the Court over-ruled this on the authority of *Kinnersley's* case, where judgment was given against him before the other had pleaded." *Rex v. Scott and Hams*, was an indictment for a riot, and upon a motion in arrest of judgment, on the ground that two defendants only had been convicted, whereas, three persons, at the least, were necessary to constitute a riot, Lord *Mansfield* said, "six were indicted, two of them were acquitted: two are dead, untried. The jury have found these two to be guilty of a riot; consequently it must have been together with those two who have never been tried; as it could not otherwise have been a riot:" and the rule was discharged. These are modern decisions, but the principle on which they are founded is ancient; for in *Thodey's* case (a), Lord *Hale* expressed it as his opinion, that where one is found guilty on an indictment for a conspiracy, if the other doth not come in upon process, or if he dies pending the suit, judgment may be had against the other: and he cites cases from the *Year Book*, 24. Ed. 3, 3 and 4, in support of that opinion. Upon these authorities, and especially upon that of *Kinnersley's* case, which seems not distinguishable from the present, it is clear that judgment may regularly be given against the defendant, *J. S. S. Cooke*, although the party with whom he has been convicted of conspiring, has not yet been tried. Then if judgment *may* be given, what ground is there for either

(a) 1 Vent. 234.

arresting or suspending it? It cannot be arrested, unless the record is imperfect; but here, there is a perfect record, and the verdict amounts to a general verdict of guilty. At most, therefore, the judgment can only be suspended until *R. S. Cooke* has been tried; and even for that there is no pretence. It is said that he may be acquitted, and that in that case *J. S. S. Cooke* would be entitled to an acquittal also. In the first place, that is a mere surmise, upon which the Court cannot properly act; for if they were thus to interfere in the present case, they might with equal propriety be called upon to interfere in the same way in every case of principal and accessory. In the second place, the acquittal of the one, would not, upon this indictment, be the acquittal of both. It is indeed said, in *Rex v. Grimes (a)*, that the acquittal of one person is the acquittal of another upon indictment of conspiracy; but that is only in cases where two only are indicted, and where it is neither laid nor proved that they conspired with others unknown. Here the indictment does charge that the defendants conspired together, and with divers other persons unknown, and the jury have in effect found by their verdict that that allegation is true. Upon the whole, therefore, it is submitted that there is no ground for making this rule absolute in either of its alternatives.

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Campbell, in support of the rule. The allegation that this defendant conspired with other persons unknown, is not only not proved, but is negatived by the verdict; because the jury in finding that he conspired with *Richard Stafford Cooke*, must have meant, and must be taken to have meant, that he conspired with him only. Then there is good ground for arresting the judgment, for this is not a perfect or general verdict; but a verdict of guilty of part only of the offence charged by the indictment. The fact that *R. S. Cooke*, the supposed co-conspirator,

(a) 3 Mod. 220.

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has appeared and pleaded, differs this case from all those that have been cited, and takes it out of the operation of the rule of practice, as laid down by Lord *Hale*, and subsequent judges. [*Abbott*, C. J. He did not plead over till after the trial of *J. S. S. Cooke*; therefore that argument falls to the ground]. One of the four defendants had not pleaded at the time of the trial, and it was a joint indictment against all four; the principle, therefore, seems to apply. This case is analogous to that of principal and accessory after the fact, and must be governed by the same rules of practice. Now, accessories after the fact cannot be tried before the conviction or attainder of their principal, unless they consent to it (*a*), and even where they do consent, and are convicted, judgment must be respited until after the conviction of their principal (*b*). Even in cases of treason, the rule is the same; for though in high treason there are no accessories after the fact, those who in felony would be accessories after the fact, being principals in high treason; still in their progress to conviction, they must be treated as accessories, and not as principal traitors (*c*). This defendant is found guilty only of conspiring with one who has not yet been tried; if that one should hereafter be acquitted, the present conviction must be held wrong: the Court therefore will, at least, respite the judgment until the propriety of the conviction can be ascertained, in order to prevent the possibility of a man being punished now for an offence of which he may hereafter turn out to be innocent.

ABBOTT, C. J.—I am of opinion that this rule must be discharged. It is first argued that the jury, by this verdict, have negatived the allegation, that *J. S. S. Cooke* conspired with persons unknown, and have found that he conspired with *R. S. Cooke*, and with him only; and con-

(*a*) 1 Hale, 632. 2 Hawk. c. 29, s. 45. Archb. Cr. Pl. 402.

(*b*) 1 Hale, 623. 2 Id. 224. Archb. Cr. Pl. 399.

(*c*) 1 Hale, 238. Archb. Cr. Pl. 401.

sequently, that *R. S. Cooke*, not having yet been tried, this is a conviction of one person of a conspiracy. I cannot say that I am satisfied, that the verdict has such an operation, or ought to receive such a construction; perhaps I entertain some doubt upon the point, but I do not think it material to decide it. The jury certainly have not found, expressly, that *J. S. S. Cooke* did not conspire with persons unknown; and without such a finding I cannot consider that the indictment is not supported by the verdict in all its allegations. Then it is said that *R. S. Cooke* has appeared, and pleaded, and that, that fact distinguishes the present from those cases which, otherwise, are certainly direct authorities against this motion. But when did he appear and plead? Not till after *J. S. S. Cooke* had been convicted; therefore, at the time of the trial, there was no plea by *R. S. Cooke*, and no judgment of respondeat ouster against him. Lastly, it is said, that *R. S. Cooke* may hereafter be acquitted; in which case, the conviction of *J. S. S. Cooke* must necessarily be bad. He certainly may be acquitted; but that is a mere surmise, upon which we cannot act so as to arrest or respite a judgment upon a defendant, who at present appears to be duly and legally convicted. The rule, therefore, must be discharged.

BAYLEY, J.—I am of the same opinion. I think *Rex v. Kinnersley and Moore*, is a clear authority against this motion. I do not consider the form of this verdict as presenting any objection; it is not conclusive as a verdict against *R. S. Cooke*, but it is clearly conclusive against *J. S. S. Cooke*. I do not altogether see the analogy contended for between this case and that of principals and accessaries; but an accessory may, with his own consent, be tried before his principal; and if he is convicted may, I apprehend, be sentenced. If the principal is afterwards acquitted, the sentence upon the accessory falls to the ground; it is ipso facto reversed. *Sanchar's case (a)*.

(a) 9 Rep. 117.

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Here we cannot presume that *R. S. Cooke* is not guilty of this indictment ; and until that appears, at least, here is a regular verdict of guilty against *J. S. S. Cooke* ; and I see no reason why that verdict should not be followed up by judgment.

HOLROYD, J.—I am also of the same opinion. There seems to me to be no ground either for arresting or respiting the judgment against this defendant. The verdict is not conclusive against his brother ; but I have heard nothing that convinces me that it is not conclusive against himself. Even if his brother should hereafter be acquitted, a presumption upon which we cannot act, still it by no means necessarily follows that the two verdicts would be inconsistent or repugnant ; or that upon this indictment, the acquittal of the one, would be, in law, the acquittal of the other.

LITLEDALE, J., concurred.

Rule discharged.

The KING v. HENRY PAIN.

An alternative charge in a conviction is bad. Conviction on 6 G. 4, c. 108, s. 49 for being on board a boat liable to forfeiture, by s. 3, for having casks attached thereto, " of the description used or intended to be used, for the smuggling of spirits : " quashed for uncertainty.

THE defendant had been convicted on stat. 6 Geo. 4, c. 108, s. 49, of having been found on board a boat, liable to forfeiture, by s. 3, of the same act, and adjudged to serve in the navy for five years under s. 80. By s. 3, it is enacted, " that if any vessel or boat, not being square rigged, belonging in the whole or in part to his Majesty's subjects, or whereof one half of the persons on board, a " of the description used or intended to be used, for the smuggling of spirits : " quashed for uncertainty.

discovered to have been on board, the said vessel or boat, shall be subjects of his Majesty, shall be found in any part of the *British* or *Irish* channels, or *elsewhere* on the high seas, within one hundred leagues of any parts of the coasts of the United Kingdom, or shall be discovered to have been within the said limits or distances, having on board, &c., or conveying or having conveyed in any manner, any brandy or other spirits, in any cask or package of less size or content than forty gallons, (excepting only, &c.), or any casks or other vessels whatsoever, capable of containing liquids of less size or content than forty gallons, *of the sort or description used, or intended to be used, or fit or adapted for the smuggling of spirits, &c.*, [unless the said "casks," as aforesaid, are really necessary for the use of the said vessel or boat, or are a part of the cargo of the said vessel or boat, and included in the regular official documents of the said vessel or boat], then and in such case the said spirits, together with the casks or packages containing the same, &c., and also the vessel or boat, shall be forfeited."

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The conviction was in the following form :—

Town and Port of Dover, } BE it remembered, that
in the County of Kent. } on the 27th day of *January*, in the year of our Lord, 1826, at *Dover*, within the town and port of *Dover*, in the county of *Kent*, an information was exhibited by *J. W.*, esquire, an officer of customs, who was directed by the commissioners of his Majesty's customs to prefer the same before us, *J. F.* and *H. L.*, esquires, two of his Majesty's justices of the peace in and for the said town and port of *Dover*, in the county of *Kent* aforesaid, against *H. P.*, which said information charged that the said *H. P.*, being a subject of his Majesty, and a seaman and seafaring man, and fit and able to serve his Majesty in his naval service, and being liable to be stopped, arrested, and detained for the offence hereinafter mentioned, was within six months now last past, that is to say, on the 21st day of *January*, in the year of

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our Lord, 1826, discovered to have been on the high seas on board a certain boat liable to forfeiture under the provisions of a certain act of parliament relating to the revenue of customs, for that the said boat, not being square rigged, and belonging in the whole to his said Majesty's subjects, on the day and year last aforesaid, was discovered to have been in a certain part of the *British* channel, having in a certain manner attached to the said boat, divers, to wit, twenty casks, capable of containing liquids, of less size and content than forty gallons each, and of the sort and description used *or* intended to be used for the smuggling of spirits, the said casks not being really necessary for the use of the said boat, and included in the official documents of such boat, contrary to the form of the statute in that case made and provided; the said *H. P.* being discovered to have been on board the said boat at the time of her becoming and being so subject and liable to forfeiture. And the said *H. P.* was on the day and year last aforesaid, for the offence aforesaid, stopped, arrested, and detained by one *J. S.*, he the said *J. S.* being then and there an officer of customs, and by him taken, brought, and carried into a certain place on land in the United Kingdom; to wit, into the town and port of *Dover* aforesaid, whereby the said *H. P.* became liable to serve his said Majesty in his naval service for the term of five years, which offence hath been duly proved before us the said justices; and it appearing to us the said justices, that the said *H. P.* is a seafaring man, and fit and able to serve his Majesty in his naval service, we the said justices do therefore adjudge the said *H. P.* to serve in his Majesty's naval service for the term of five years. Given under our hands and seals, &c."

Platt now moved to quash the conviction, for four objections; first, the casks are described to be such as are "used *or* intended to be used for the smuggling of spirits," which is an alternative proposition, and in a conviction is

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clearly bad, upon decided authorities, *Rex v. North* (a). Had the word "*and*" instead of "*or*" been used, it would have been well enough. Here, however, there is too much ambiguity in the charge, and as this act of parliament is highly penal, it must be construed with strictness. Secondly, the statement that the casks were in "a certain manner" attached to the boat, is too general; the manner ought to have been expressly shewn. Third, the boat is only stated to have been discovered "in a certain part of the *British* channel," without shewing that it was within one hundred leagues of the coast of the United Kingdom, pursuing the language of the statute. The Court will not take judicial notice of the width of the *British* channel, and therefore, unless the vessel was within one hundred leagues of the coast of *Great Britain*, it is no offence under this statute, *Deybel's case* (b). Fourth, the conviction does not negative all the exceptions of the act of parliament; for although the casks may not have been necessary for the use of the vessel, nor included in the documents of the vessel, yet, they may have been a part of the cargo; in which case, there is an exemption from the penalties of the act. [Abbott, C. J. I think the last three objections are untenable. It appears to me to be unnecessary to state in what manner the casks were attached to the boat. With respect to the next objection, we must give a reasonable interpretation to the words "in any part of the *British* or *Irish* channels, or *elsewhere*, within one hundred leagues of any part of the United Kingdom." If the vessel is found in the *British* or *Irish* channel, and it is so expressed in the conviction, I think that is sufficient. Then, as to the fourth objection, I think, it was unnecessary to negative, that the casks were a part of the cargo; because if they were, they ought to have been included in the regular official documents of the vessel, which fact is

(a) Ante vol. vi. 143. See *Paley on Convictions*, 2d ed. by Dowling, part 2, c. 1. *Rex v. Sadler*, 2 Chit. 519.

(b) 4 B. & A. 243.

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expressly negated in the conviction. Upon the first objection, which is more material, we shall hear the Attorney General].

Copley, A G., and H. J. Shepherd, contra. The words "used or intended to be used for the smuggling of spirits," must be taken as matter of mere description, and not as constituting the definition of the offence. The word "description" over-rides the following sentence, and if so, then there is no ambiguity produced by the use of the word "or." The statute merely illustrates the description of casks which shall be the cause of forfeiture, by saying such as are ordinarily "used or intended to be used, or fit or adapted for the smuggling of spirits." [*Bayley, J.* The words "intended to be used," apply to some mental operation in the party charged, and that is put alternatively in the conviction]. Surely the whole of that sentence is connected with the word "description," and does not constitute the offence charged. It is unnecessary to describe particularly the sort of casks; it is sufficient to say such a description of casks, as is ordinarily used, or intended to be used for smuggling. The sort or description of casks used or intended to be used for such a purpose is matter of notoriety. [*Bayley, J.* There are three descriptions of casks mentioned in the statute; one, the sort that is actually used, another such as is *intended* to be used, and the other such as is *adapted* for the purpose of smuggling; you ought to have said distinctly which description these casks fell under. *Abbott, C. J.* You might have said "the description fit and adapted for smuggling," or "the sort of cask used *and* intended to be used;" but here you put it in the alternative. *Littledale, J.* Suppose casks to be used, altogether different in shape, which had never been used for the purpose of smuggling before, then the language of the statute would not be satisfied]. Then they would fall under the words "fit or adapted," whether they were the sort ordinarily used or not. [*Bay-*

ley, J. You ought to have designated which of the three descriptions these casks fell under ; any one would have done. *Abbott*, C. J. They may be all different things ; and in a conviction there must be certainty]. There is no ambiguity here so as to affect the substance of the conviction. The defendant has sustained no prejudice in his defence ; for it was competent to him to shew that these were not casks used or intended to have been used for smuggling. A conviction does not require so much certainty as an indictment. Though an alternative charge may be bad in an indictment, it does not follow that it would be so in a conviction. In *Rex v. Middlehurst* (a), Lord *Mansfield* said, “ upon indictments it hath been determined that an alternative charge is not good, (as forged or caused to be forged) ; though one only need be proved, if laid conjunctively, (as forged and caused to be forged) ; but I do not see the reason of it ; the substance is exactly the same, the defendant must come prepared against both ; and it makes no difference to him in any respect. But this is an order ; and being good in substance, needs not be literally so strict.” [*Bayley*, J. That was the case of an order, and there is an acknowledged distinction between an order and a conviction]. And yet very penal consequences often follow upon an order of justices ; and there is no sensible reason why one should require more certainty than the other.

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ABBOTT, C. J.—Whether the decision in *Rex v. Middlehurst* is correct, is not a question now before us, but that is a direct authority to shew, that in an indictment, the objection taken to this conviction would be fatal ; and I know of no authority, which says, that a conviction must not have as much certainty as an indictment. Now this act of parliament mentions three sorts or descriptions of casks, which, if found on board, or attached to a vessel, will render it liable to forfeiture. One is a sort

(a) 1 Burr. 399.

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which existed on the first day, but did not come to the knowledge of the counsel until afterwards, and the Court held, that the challenge came too late. In *Dovey v. Hobson* (a), where a person not summoned to serve on a jury, answered to the name of a person who was, and served in his room, the Court were of opinion, that there ought to be a venire de novo; but that was expressly on the ground, that the objection had been made before the verdict was taken. In *Hill v. Yates* (b), which was considered by the twelve judges, it was solemnly decided, that where the son of a juryman, summoned and returned, answered to his father's name when called on the panel, and served as one of the jury on the trial of a cause, it was not, of itself, a sufficient ground for setting aside the verdict, as a mis-trial; and Lord *Ellenborough*, in delivering judgment, said, that if the Court were to listen to such an objection, they might set aside half the verdicts given at every assizes, where the same thing might happen from accident and inadvertence, and possibly sometimes from design, especially in criminal cases. In the *Case of a Juryman* (c), it was held by the twelve judges, that where R. C. answered to the name of J. C., on the sheriff's panel, at the trial of a prisoner for a capital felony, it is mere matter of challenge, and after verdict cannot be taken advantage of by the party convicted, as a mis-trial. These are authorities to shew, that the Court will not, on light grounds, disturb a verdict where no injustice appears to have been done; and none is here suggested. It is no objection to the capacity of this person to be sworn, that he was under age, for by law, every male person of the age of twelve years, and upwards, may be sworn to his allegiance in the leet, *Com. Dig. Allegiance*, b; *Co. Litt.* 68 b; 7 *Rep.* 6 b; 1 *Bul.* 190. Neither is it any objection that he was not qualified in respect of property; nor does it seem to be any objection to him, that he was not summoned, *Rex v. Hunt* (d). But admitting all these to be valid objections,

(a) 2 Marsh. 154.

(b) 12 East, 229.

(c) Id. p. 231 (n).

(d) 4 B. & A. 430.

still they are only available by way of challenge, and cannot be taken advantage of after verdict. If the present application were granted, it would open a door for the mischievous practices suggested by Lord *Ellenborough*, in *Hill v. Yates*, and encourage persons to take the chance of a verdict in their favour, on a first trial, and reserve such objections in the event of an adverse verdict.

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C. F. Williams, [with whom was *R. Bayly*], contra. The cases cited on the other side are wholly inapplicable to the difficulty arising in this case. In the first place, an infant is utterly disqualified from serving on a jury, by statute 7 and 8 *Wm.* 3, c. 32, s. 4, by which it is declared, that young men under 21 years of age, shall not serve upon juries. Secondly, he is disqualified by want of property; and, thirdly, he was never summoned, and that is a decisive answer to the argument that the objection should have been taken by way of challenge; for if he was never returned on the *venire facias*, he was no juror, and error might be assigned for that defect, *Fines v. Norton* (a). [The Court here stopped him].

ABBOTT, C. J.—I am of opinion that there ought to be a new trial. I do not see how a challenge, properly so called, could have been taken to this person, he not having been summoned as a juror. If he had been returned on the panel, then a challenge would have been the proper mode of objecting to him. No person, on either side of this case, appears to have been aware that this young man, who had thus intruded himself into the box, was not the party really returned upon the jury. The cause being to be tried by a special jury, the tales, if prayed, would be to be taken from some other list, and a tales being prayed, this person is supposed to be taken from that other panel. I am aware of the difficulty men-

(a) *Cro. Car.* 278. See *Norman v. Beaumont*, *Willes*, 484; *Wray v. Thorn*, *Barnes*, 453, and *Willes*, 488.

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tioned by Lord *Ellenborough* in *Hill v. Yates*, that this objection would afford an opportunity for practice—that by under-hand contrivances a party might get a person who is disqualified, to answer for another, and to serve on the jury, reserving to himself the power of bringing the objection forward, if the verdict should be against him. There is that difficulty certainly, and it is necessary to guard, as well as we can, against such practices; but I do not know that we should be justified, merely from the apprehension of mischief that may arise in some cases hereafter, by reason of illegal practices of that kind, in going the length, [which we must do, if we refuse this rule], of saying, without any practice on either side, that a verdict pronounced by a jury, on which a person incompetent both by reason of non-age and want of qualification, has served, ought to stand, particularly in a case so highly penal. I think we must not suffer ourselves to be influenced, on the present occasion, by an apprehension of ill consequences that may arise in other cases hereafter. Indeed, it is not very likely that such practices can be of frequent occurrence, or that many persons would be likely to interpose and serve on a jury, to whom such an objection as this would arise. Considering the way in which this objection has occurred, and that we are not restrained by any technical rule of law, I think we are bound to look to the facts of this particular case, and say, that the only mode of correcting this error, is, to make the rule absolute for a new trial. It is quite clear, that it cannot be corrected in any other way.

BAYLEY, J.—I am of the same opinion. The affidavits which have been filed, free the defendant from all blame in this proceeding, which, indeed, appears to have arisen from mistake only. In “*the case of the Jurymen*”(a), before Mr. Baron *Eyre*, the man who served on the jury, had been duly summoned, though by a wrong name; and he

(a) 12 East, 231 (n).

was also duly qualified to serve: and in the case of *Hill v. Yates*, there was reason to suppose that the party who actually served was qualified to serve on the jury. In the present case, there are greater difficulties, for this young man is an infant; he is not qualified in respect of property, and he has not been summoned, or returned on the panel. I apprehend that one of the objects of taking juries from panels is, that notice may be given to the parties before the jurors come to the assizes, so as they may know to whom they may direct their challenges. In one or two cases in *Croke Elizabeth* (a), it was held, that if one man be returned in the venire facias, and a different man in the distringas, who serves as the juror, it is error. In *Hasset v. Payne* (b), which was the case of an attain, one *George E.*, was returned upon the venire, and upon the distringas *Gregory E.* was returned, and appeared in lieu of *George E.*, and was sworn, and tried the matter, and the whole Court were of opinion that this was only a trial by eleven jurors, and the attain was staid.

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HOLROYD, J.—It appears to me, that in this case we could not pronounce a judgment upon the verdict against the defendant. The affidavits acquit the defendant of all fault in the transaction, and discharge him of any privity to this young man's serving on the jury. The verdict has been found by eleven competent jurymen only. The twelfth is, by law, incompetent, he not having attained the age at which the law considers him of capacity to judge on matters of this kind; and that being so, we ought not to pass judgment upon a verdict so found, particularly in so serious a crime as perjury. To support a judgment, it must be founded on a verdict delivered by twelve competent jurors. This man was incompetent, and, therefore, there has been a mis-trial.

LITLEDALE, J.—I think there ought to be a new

(a) *Fermor v. Dorrington*, Cro. Eliz. 232.

(b) *Id.* 256.

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trial. It is admitted on all sides, that if a person is returned on the panel, who is incompetent to serve on the jury, it is a cause of challenge; but in this case, the young man was not returned on the panel, nor was he summoned. He was, therefore, no juror at all, and it is but the verdict of eleven men. We may consider this case in the same light as if the ground of challenge had appeared on the record; in which case, it would be clearly error; and the fact being now admitted, that this young man was under age at the time, I am decidedly of opinion that there has been a mis-trial.

Rule absolute for a new trial.

Friday,
December 3.

DAVID v. ELLICE, sued with JOHN BELLINGHAM INGLIS, and JAMES INGLIS, surviving partners of JOHN INGLIS, deceased.

One of four partners having retired, the other three continued the business, assuming the funds, and charging themselves with the partnership debts. A., a creditor of the old firm, was informed of this arrangement, and his account was, with his consent, transferred from the old firm to the new, with whom he continued to have dealings, drawing upon them and making them payments for about twelve months, when they failed, in his debt.—Held: that the retired partner was still liable to A., for the balance due to him by the old firm, though if A. had drawn for that balance at any time during the solvency of the new firm, it would have been paid.

ASSUMPSIT for money lent. The defendant *Ellice* pleaded the general issue, non-assumpsit. The other defendants pleaded bankruptcy. Issue was joined on both pleas. At the trial before *Abbott*, C. J., at the *London* adjourned sittings after *Trinity* term, a verdict was found for the defendants, *J. B. Inglis*, and *J. Inglis*, and the plaintiff obtained a verdict against the defendant *Ellice*, with 13,162*l.* 5*s.* 8*d.* damages. A motion being made in the following term, for a rule to shew cause why the verdict obtained by the plaintiff should not be set aside, the Court directed the facts to be stated in the following case:

The plaintiff, at the time hereinafter mentioned was, red from the old firm to the new, with whom he continued to have dealings, drawing upon them and making them payments for about twelve months, when they failed, in his debt.—Held: that the retired partner was still liable to A., for the balance due to him by the old firm, though if A. had drawn for that balance at any time during the solvency of the new firm, it would have been paid.

and still is, a merchant, residing in *Canada*. The defendants and *John Inglis*, deceased, carried on business as merchants in partnership together, in *London*, under the firm of *Inglis, Ellice, and Co.* The plaintiff had various dealings with the said firm, prior to the 30th *April*, 1821. On the 30th *April*, 1821, the defendant *Ellice* retired from the said firm, and a circular letter was in consequence sent to the correspondents of the said firm, and among the rest to the plaintiff, of which the following is a copy :—

“ *London*, 30th *April*, 1821.

We beg to acquaint you that Mr. *Ellice* retires from our firm from the present date. The business of the house will be continued as heretofore by the remaining partners, who assume the funds, and charge themselves with the liquidation of the debts of the partnership.

(Signed) *Inglis, Ellice, and Co.*”

The above circular was transmitted by *Inglis and Co.* to the plaintiff, in a letter dated 10th *May*, 1821, of which the following is an extract :—“ The circular herewith will inform you of the recent alteration of our firm ; our business continues in other respects as heretofore ; our means of carrying it on unimpaired ; and we beg to inform you that your concerns in our hands will still be an object of our attention. We wrote you last the 2d ulto. Nothing interesting has occurred since in your affairs here ; there has been some little inquiry after ashes, and we propose attempting to-morrow a public sale of yours on hand.”

On the 28th *June*, 1821, the plaintiff wrote and sent a letter to the new firm of *Inglis and Co.*, of which the following is an extract :—“ *Montreal*. 28th *June*, 1821. Messrs. *Inglis and Co.*, Sirs,—Since the foregoing I am favoured with yours of 10th ulto., with circular of 30th *April*, advising the change in your firm, which continues to have my full confidence. The accounts will be transferred as soon as I receive my account current, and an account opened for the new firm.

David David.”

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Messrs. *Inglis, Ellice* and Co., having been for many years in the habit of making up their *Canada* accounts to the 30th *June* annually, the account current of *Inglis, Ellice*, and Co. with the plaintiff was made up to the 30th *June*, 1821, and not to the 30th *April* preceding, the time of the defendant *Ellice's* retirement from the firm, and was transmitted to the plaintiff at *Montreal*, by the new firm of *Inglis* and Co., in a letter dated 17th *July*, 1821, of which the following is an extract :—" Since we wrote you 26th ulto., per copy herewith, we have had the pleasure to receive your letter, dated the 11th *May*. The order enclosed in it we hope to execute, wholly, or in part, by this conveyance, the *Dryad*. We inclose herein your account current, balanced 30th ulto., by 18,905*l.* 9*s.* 10*d.* in your favour, and at your credit in new account with our present firm. We shall be glad to hear you have received it, and found it correct."

*Inglis* and Co. did not open any new books of account, but continued to keep the account with the plaintiff in the same books, and in the same manner, after the said 30th *June*, 1821, as it had previously been. On the 24th *September*, 1821, the plaintiff wrote and sent to *Inglis* and Co., a letter, of which the following is an extract :—

*Montreal*, 24th *September*, 1821.

Messrs. *Inglis & Co.*,


SIRS,

The account current with your late firm is received, and to the exception of the outstanding debts of 1804, is perfectly correct. Have transferred in a new account with your present firm, whose confidence, I hope, I shall continue to merit.

*David David.*"

On the 3rd *November*, 1821, the plaintiff drew a bill for 5000*l.* on the new firm, as follows :—" *Montreal*, 3rd *November*, 1821. Exchange for 5000*l.* sterling. At 60 days' sight of this second of Exchange, first and third of the same tenor and date not paid, pay to *Robert Griffin, Esq.*,

cashier of the *Montreal* Bank, or order, 5000*l.* sterling, value received, and charge the same to account of, per advice of, *David David*. To Messrs. *Inglis* and Co. (Indorsed) *London*. Pay to the order of Messrs. *Thomas Wilson* and Co., *R. Griffin*., *T. Wilson* and Co.; Received, *Glyn* and Co."

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This bill was advised of in two letters, which follow:—

"*Montreal*, 3rd November, 1821.

Messrs. *Inglis* & Co.,

SIRS,

I wrote you on the 15th and 31st ulto; the former advising, if I did draw on you, it would be in favour of the *Montreal* Bank; the present serves to advise of my having drawn on you of this date, in favour of *Robert Griffin*, Esq., cashier of the *Montreal* Bank, at 60 days' sight, 5000*l.* sterling, which please honour. The late news of the failure of your crops will, no doubt, bring a number of bills into the market; and I expect shortly to replace this sum to advantage.

*David David*."


"*Montreal*, 12th December, 1821.

Messrs. *Inglis* & Co.,

SIRS,

When I drew on you for so large a sum as 5000*l.*, I was in hopes of replacing it 'ere this to advantage, instead of which bills are now at 10 per cent., and the money lays in the bank without interest, which, by the bye, is a bad speculation. Stock, at the *Montreal* Bank, is at par, and in the bank at *Canada*, 17½ per cent. discount; but the latter I have not much confidence in."

The new firm of *Inglis* and Co., continued to act as the mercantile agents and correspondents in *London* of the plaintiff; and on the 23rd *July*, 1822, they made up and sent to the plaintiff, the first account in their own names with him, to the 30th *June* preceding. On the 7th *August*, 1822, Mr. *John Inglis*, the senior partner in the

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new firm of *Inglis* and Co., who had been also senior partner in the former firm of *Inglis, Ellice, and Co.*, died, and thereupon *Inglis* and Co., suspended their payments.

On the 14th *October*, 1822, the plaintiff wrote and sent to *Inglis* and Co., a letter, of which the following is an extract:—

“ *Montreal*, 14th *October*, 1822.

Messrs. *Inglis & Co.*,

SIRS,

Your sundry favours of the 23rd, 27th, and 30th *July*, and 13th, 23rd, 26th, and 29th *August*, came duly to hand; that of the 23rd *July*, covering account current, has been examined and found correct, to the exception of the outstanding debts of 1804, remarked every year. Yours of the 13th *August*, conveying the melancholy tidings of the death of your senior, my old and much lamented correspondent, for whose loss I am fully sorry, and feel confident the survivors will do me every justice that my long *confidence* in that concern merits.”

On the 16th *February*, 1823, the plaintiff wrote and sent to *Inglis* and Co., another letter, of which the following is an extract:

“ *Montreal*, 16th *February*, 1823.

Messrs. *Inglis & Co.*,

SIRS,

As the late firm of *Inglis, Ellice, and Co.*, are bound to me for part of the heavy sums due to me, I request you will send me a statement of that part of the amount, and also that part due to me by *Inglis* and Co.  
*David David.*”

To which letter *Inglis* and Co. returned an answer to Mr. *David*, at *Montreal*, dated *London*, 3rd *April*, 1823, of which the following is an extract:—“ We thank you for the assurance of your continued confidence and good-will during the present unsettled state of the house, and particularly of the question respecting the respective liabilities of the old and new firms. We

are advised not to attempt a separation of any accounts. You will, we doubt not, agree in this ; but for your information in the mean time, we hand herewith a transcript of the account open as it stands in our books."

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*Inglis* and Co. also sent to the plaintiff, inclosed in the last-mentioned letter, a sketch of a further account current. On the 27th *May*, 1823, a commission of bankrupt issued against the defendants, *J. B. Inglis*, and *J. Inglis*, under which they have been duly found and declared bankrupts, and obtained their certificates. The new firm continued in credit, and carried on business to a great extent, from the time when the defendant *Ellice* retired, till the death of *John Inglis*, having made payments during that time to the amount of 1,847,000*l.* A witness, who had been a clerk in the house of *Inglis* and Co., examined on the part of the defendant, stated, that if the plaintiff had drawn upon the new firm for the balance of his account, due at the time of the retirement of the defendant *Ellice*, at any time between such retirement and the death of Mr. *John Inglis*, he had no doubt it would have been paid. The sum of 13,162*l.* 5*s.* 8*d.*, for which the verdict passed, is the balance due upon the account of the 30th *June*, 1821, after giving credit for all the payments made by the new firm of *Inglis* and Co., to the plaintiff, or on his account, without taking credit for any payments made by the plaintiff to the new firm.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover. If the Court are of that opinion, the verdict is to stand ; otherwise, a new trial is to be granted.

*Campbell*, for the plaintiff. There is no ground for disturbing this verdict ; for the plaintiff is entitled to retain it, upon every principle of law and justice. *Ellice* was clearly liable, as a principal, for the balance due to the plaintiff up to the 30th *June*, 1821, and the only question is, when, or how, did he become discharged from that




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liability? The alteration in the firm was no consideration for a release to *Ellice*, because the plaintiff gained no additional security by it; for the firm was only diminished in number, one partner retiring from it, and no other coming in. The mere transfer of the account, therefore, from the old firm to the new, could not operate as a release to *Ellice*, because, even if it was intended so to operate, of which there is no evidence, it was a release without consideration, and was consequently nudum pactum, and void. It will perhaps, be said, that if there was no benefit attaching to the plaintiff, still there was a prejudice incurred by *Ellice*, and that the latter constituted a good consideration for the release. But there was no evidence that *Ellice*, upon his retiring, left any of his own funds in the hands of the new firm, so that he could be prejudiced by the plaintiff's neglecting to draw out his balance during the solvency of the house; and the law will never allow one partner to retire, perhaps taking with him a large portion of the capital, leaving the remaining partners to pay the partnership debts, and referring the partnership creditors to the remaining partners only. There was no contract for relieving *Ellice* from his original liability to the plaintiff; there was no act done by *Ellice*, amounting to an accord and satisfaction to the plaintiff; the dissolution of the partnership was neither the one nor the other; it worked no prejudice to *Ellice*, it conferred no benefit on the plaintiff; it had no effect upon their previous transactions, or upon their relative pre-existing claims and liabilities. *Heath v. Percival* (a), was a much stronger case than the present, and yet is an authority in favour of the plaintiff; it was this:—*Heath* held a bond of *Percival* and *Evans*, who carried on business in partnership together. The bond carried 5 per cent. interest. A dissolution of partnership took place, and notice was given that all who held bonds or notes should come in and receive their money, or look to *Evans* only for payment, *Percival* retiring from the busi-

(a) 1 P. Wms. 682.

ness. Upon this notice *Heath* called in his money, but afterwards continued it with *Evans*, upon his subscribing his bond at 6 per cent. interest, instead of five. A long time afterwards *Evans* became insolvent, and *Heath* put the bond in suit against *Percival's* representatives. They applied to a court of Equity for relief, but it was, under these confessedly strong circumstances, denied; that Court being of opinion that the original debt, from *Percival* and *Evans* jointly, remained unsatisfied. *Daniel v. Cross (a)*, was also a case in equity. There, bankers, upon a deposit of money with them, gave notes bearing interest; the partnership was dissolved; one of the partners soon afterwards died, and his creditors were called by advertisement: another partnership was formed by the survivors and others, who re-issued notes of the former partnership, and paid the interest of the deposit notes for near two years, when they failed: and it was held, that the assets of the deceased partner were not discharged, for the notes were securities for money borrowed by the partners, and a receipt of interest from the surviving partner, no matter whether a new partnership or not, could not discharge the estate of the deceased partner. *Bedford v. Deakin (b)*, was a case in this Court, and the decision there proceeded upon the same principle. There, one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, reserving his right against all three, and retaining possession of the original bills: and it was held, that the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking under such circumstances the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the original joint debt. *Bayley, J.*, there said, "all the three partners

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(a) 3 Vesey, 277.

(b) 2 B. &amp; A. 210.

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originally were jointly liable to this debt ; and no arrangement between themselves can vary the right of the creditor :” and *Holroyd, J.*, said, “ the agreement between the three partners cannot vary the plaintiff’s right, even though it was communicated to him.” These expressions are directly applicable to the present case ; and, in principle, it is impossible to distinguish the one case from the other. *Lodge v. Dicas (a)*, is another authority to the same effect. There, upon the dissolution of a partnership, it was agreed between the partners that one of them should take upon himself to discharge a debt to A. : A. was informed of this, and expressly agreed to exonerate the other partners from all responsibility ; yet it was held, that these circumstances did not constitute any defence to the latter in an action by A. against both partners. *Newmarch v. Clay (b)*, will perhaps be cited on the other side, but has in reality no application, because that was merely a question of a specific appropriation of a payment, in discharge of a particular debt, by a creditor, and not a question of the general liability of a retired partner ; the cases, therefore, are materially different.

*Tindal, contra.* The circumstances of this case amount in substance to a receipt of the debt by the plaintiff from the old firm, and a loan of the amount by him to the new firm ; or to an accord and satisfaction to the plaintiff, for a good consideration, as against the defendant. First, if the money had actually passed, though but for a moment, from the old firm to the plaintiff, and then had repassed from the plaintiff to the new firm, there would have been no doubt in the case ; and in substance and effect it is clear that it did so pass and repass. The circular letter informs the plaintiff that the new firm are “ to assume the funds, and to charge themselves with the liquidation of the partnership debts,” of which his was one. To this he assents, and himself proposes, “ that the accounts shall be transferred as soon as he receives his account current, and

(a) 3 B. &amp; A. 611.

(b) 14 East, 249.

an account opened for the new firm." His account current is sent to him, balanced, and "carried to his credit in a new account with the new firm;" so that the transfer of the account is made with the knowledge and consent of all the parties, and is expressly ratified by the plaintiff, who afterwards says, "the account current with your late firm is received; have transferred in a new account with your present firm." Shortly after this he draws to a large amount upon the new firm, dealing with them as his agents, and shewing that he considered them, and them only, as his debtors. The new firm continued solvent for several months longer, and it was proved that if the plaintiff had at any moment drawn upon them for the full amount of his debt, it would have been paid. From such a state of facts, and from such a line of conduct, it is impossible to doubt that both parties intended and understood the transaction to be, a receipt of the debt from the old firm, and a loan of the amount to the new firm. If so, the defendant is released from his original liability, for an agreement for such a purpose may be lawfully made, and has been repeatedly sued upon. *Browning v. Stallard* (a), is a case in point. There, A. sold goods to B., who being unable to pay for them, transferred them to C., who promised A. to pay him for them: and it was held, that this amounted to a new sale by A. to C., and was not a mere promise by C. to pay the debt of B. *Wade v. Wilson* (b), is an authority to shew that there may be a constructive loan such as is contended to have taken place here. It was there held, that if A. is indebted to B., and B. is indebted to C., and C. agrees for an usurious consideration to accept A. for his debtor instead of B.; this may be laid to be for an usurious loan of so much money from C. to A.; and, that the contract may be laid as for a forbearance to A. alone, who was the real debtor, although B. had joined with him in the security given to the lender. *Israel v. Douglas* (c);

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(a) 5 Taunt. 450.

(b) 1 East, 195.

(c) 1 H. &amp; Bl. 239.

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*Surtles v. Hubbard* (a); and *Hodgson v. Anderson* (b); are all examples of similar decisions. Then, secondly, there is a good consideration here for the release to the defendant, arising, first from a benefit coming to the plaintiff, and secondly from a detriment coming to the defendant. The plaintiff derived a benefit, inasmuch as he was after this arrangement allowed to draw upon the new firm for more than he had in their hands, independently of such arrangement; and the defendant suffered a detriment, because he left funds of his own in the hands of the new firm, which he certainly would have drawn out, if he had considered himself liable to the debts of the old firm. [Abbott, C. J. There is no evidence that the defendant left any funds in the hands of the new firm]. The facts of the case most clearly imply that he did so; for he must have had funds in the house when he retired, and it is not stated that he withdrew any from it; and the language of the circular letter, which states that the new firm will assume *the funds*, as clearly means *the joint funds*, upon which the old firm had traded. [Abbott, C. J. But even if there was an agreement, either express or implied, such as you rely upon; still there was no such consideration as would make it operate as an accord and satisfaction; for the plaintiff acquired no fresh security, and no new debtor; he lost a debtor, and pro tanto, his security was diminished]. At least the defendant sustained a detriment by the arrangement, and that is a sufficient consideration. All the cases cited on the other side are distinguishable from the present in that respect. In *Gough v. Davies* (c), there was no transfer of the debt, and no notice of such transfer to the creditor, and yet it was held there, that if a balance had been struck, and carried to the new account, with the knowledge and consent of the plaintiff, that would have constituted an agreement to release the old firm.

(a) 4 Esp. 203.

(b) Ante, vol. v., 735.

(c) 4 Price, 200.

[*Bayley, J.* But there, a new partner was introduced, which essentially distinguishes that case from the present].

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The case was argued on a former day in this term, when the Court took time for consideration. Judgment was now delivered by

ABBOTT, C. J., who after recapitulating the facts of the case, thus proceeded. Upon this state of facts, we are all of opinion that the plaintiff is entitled to recover. It was contended, on the part of the defendant, that the transfer of the plaintiff's account from the old firm to the new with his knowledge and consent, coupled with the correspondence which then took place between him and the new firm, and the dealings which they afterwards had together, amounted to an agreement on his part to accept the new firm as his sole debtors, and thereby operated as a release of the defendant's prior liability: and some cases were cited, and relied upon as supporting that argument. With respect to those cases it is sufficient to observe, that in all of them there was a new partner introduced into the firm, or a new debtor acquired by the creditor, so that his security was either increased, or, at least was not diminished; whereas here, the only alteration is the retirement of one partner from the firm, so that the creditor lost a debtor, and had his security so far diminished. Even if the plaintiff can be considered as consenting to accept the new firm as his debtors, and to release the defendant, still unless there was some consideration for such an agreement, it would be nudum pactum, and could not be binding on him. We are of opinion that there was no consideration for such an agreement in this case. In the shape of benefit to the plaintiff, there clearly was none, as I have already shewn; and in the shape of detriment to the defendant, we also think there was none, for there was no evidence that he left any funds in the hands of the new firm, which was the only mode in which he could be injured by the plaintiff's

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neglecting to draw out his balance in their hands. Upon these short grounds, we think the verdict found for the plaintiff was right, and that he is entitled to retain it.

Judgment for the plaintiff.

Friday,  
3d February.

BOTTOMLY v. BOVILL.

Policy on a ship "from London to New South Wales, and from thence to all parts and places in the East Indies, or South America; with liberty to take in and land goods and passengers, and to trade backwards and forwards, and forwards and backwards." On arriving at New South Wales, the captain was ordered by his owners to proceed on a trading voyage to New Zealand, and from thence direct to South America. He proceeded to New Zealand with passengers, and was returning from thence to New South Wales, when the ship was totally lost:—Held, that the sailing from New South Wales to New Zealand, and back, was a deviation from the voyage insured, by which the insurers were discharged.

ASSUMPSIT on a policy of insurance on the ship *Brompton* "from London to New South Wales, and from thence to all ports and places in the East Indies or South America, with liberty to take in and land goods and passengers, and to trade backwards and forwards, and forwards and backwards; premium 80s. per cent, to return 29s. 6d. if the voyage ends at New South Wales, and 15s. 6d. if the voyage ends at South America." Plea, non assumpsit, and issue thereon. At the trial, before Abbott, C. J., at the London adjourned sittings after Hilary term, 1825, the case was this. The ship sailed, under the policy in question, from London to New South Wales, with convicts, and arrived there in safety in April, 1823. During her stay there, the captain received instructions from the owners to proceed as soon as possible upon a trading voyage to New Zealand, and from thence direct to South America. Instead of obeying these instructions, the captain took on board a party of missionaries bound for New Zealand, and proceeded with them only to that place, and from thence set out on his return to New South Wales, with the intention of then proceeding from thence upon a trading voyage to South America; but on the return voyage from New Zealand to New South Wales, and before the trading voyage had

been commenced, the ship was totally lost. The plaintiff's interest under the policy, the defendant's subscription of it, and all the formal parts of the case were admitted. The question was, whether the voyage from *New Zealand* to *New South Wales* and back, not having been undertaken in furtherance of the trading voyage, and having been contrary to the instructions of the owners, was or was not a deviation from the voyage insured by the policy. The Lord Chief Justice was of opinion that it was a deviation, and the jury, upon that ground, and under his directions, found a verdict for the defendant.

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*Scarlett*, in *Easter* term last, obtained a rule nisi for a new trial; against which,

*Marryat*, *Gurney*, and *Maule*, now shewed cause. The voyage from *New South Wales* to *New Zealand* and back, was clearly a deviation, for it was undertaken expressly against the directions of the ship's owners, and was from first to last wholly unconnected with the object of the parties and the voyage meant to be protected by the policy, namely, a trading voyage from *New South Wales* to *South America*, or to the *East Indies*. In *Rucker v. Allnutt* (a), it was held that under a policy of insurance at and from *London* to any ports or places in the *Baltic*, backwards and forwards, with leave to touch and stay at any ports and places, *for all purposes whatsoever*; the assured might wait at any port for information as to what port in the *Baltic* the ship might proceed to with safety; *because that*, under the particular circumstances of the case, *was one of the objects of the adventure*. In *Mellish v. Andrews* (b), it was held, that a policy of insurance at and from *London* to the ship's discharging port or ports in the *Baltic*, *with liberty to touch at any port or ports for orders*, did not warrant the assured, after having touched at C. for orders, and gone on to S., a more distant port, in re-

(a) 15 East, 278.

(b) 16 East, 312.



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touching at C. for orders. In a subsequent case, between the same parties (a), the policy was at and from *London* to the ship's discharging port or ports in the *Baltic*, with *liberty to touch at any port or ports for orders, or any other purpose*, and to touch and stay at any ports or places whatsoever and wheresoever: and it was held that the ship having touched at C. for orders, and gone on to S., a more distant port, for further orders, and *having received orders* at S., because it was unsafe to land there, to return to C., and wait for orders; might return to C. without being guilty of a deviation; it being found that she went to S. for orders *in the prosecution of her voyage*, and returned to C. *to obtain orders as to the farther progress of her voyage*. In *Hammond v. Reid* (b), the policy was from *Para* to *New York*, with leave to call at any of the *Windward* and *Leeward* islands on the passage, and to discharge, exchange, and take on board the whole or any part of any cargo at any ports or places, particularly at all or any of the *Windward* and *Leeward* islands, *without being deemed any deviation*: and the ship having proceeded to two of the *Leeward* islands, *for a purpose unconnected with the voyage*, it was held a deviation. In *Solly v. Whitmore* (c), the ship was insured at and from *Hull* to her port or ports of loading in the *Baltic* sea and *Gulph of Finland*, with liberty to proceed to, and stay at any port or ports whatsoever, for any purpose, particularly *Elsinore* and *Danzig*, to deliver goods, *Pillau* being her port of loading, and it was held a deviation. These are all decisive authorities to shew, that the voyage upon which the ship was lost in this case, was a deviation from the voyage insured; and the definition given by two writers on the subject of a deviation, goes the same length, for they define it to be a voluntary departure, without necessity, from the usual course of the voyage insured (d);

(a) *Mellish v. Andrews*, 2 M. & S. 27. (b) 4 B. & A. 72.

(c) 5 B. & A. 45.

(d) *Marshall on Insurance*, ii.

392. *Park on Insurance*, 335.

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which the sailing to *New Zealand* here certainly was. But, even admitting that this is not, strictly speaking, a deviation from the voyage insured, still, it is an abandonment of that, and an adoption of a different voyage, and, if so, the underwriters are equally discharged. That was expressly laid down in *Wooldridge v. Boydell* (a). There a ship insured from *Maryland* to *Cadiz*, appeared by her papers to have had a different voyage in view, and was captured in the track to both places, before she had arrived at the dividing point; and it was held that this was no deviation, but a different voyage, and that the insurers were discharged. And that decision was afterwards recognized and confirmed in *Way v. Modigliani* (b), where it was held, that if a ship insured from a certain time sails before that time on a different voyage from that insured, the assured cannot recover, though she afterwards gets into the course of the voyage described in the policy, and is lost after the time when the policy was to have attached. *Buller, J.*, there said, "The voyage insured is from a port in *Newfoundland* to *England*, whereas, this vessel sailed to the *Banks*, which is a different voyage. This point has been already decided by the case of *Wooldridge v. Boydell*, where it was held, that if a ship insured for one voyage, sail upon another, although in the same track part of the way, and she be taken before the dividing point of the two voyages, the policy is discharged. That was a stronger case than the present, for there the very intention of sailing upon a different voyage than that insured, vacated the policy: here she actually went and fished upon *the Banks* after she sailed from port." Besides, the policy must be construed according to the intention of the parties, and it is perfectly clear, from the amount of the premium, the language of the contract, and the conduct of the parties, that there was no intention to insure the risk in the course of which the ship was lost. Upon all these grounds, therefore, it is

(a) 1 Doug. 16.

(b) 2 T. R. 30.

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plain that the defendant in this case is released from liability, and that this rule must be discharged.

Scarlett, Campbell, and F. Pollock, contra. The amount of the premium, and the supposed intention of the parties, cannot be taken into consideration by the Court in deciding this, which is purely a question of law, namely, what is the legal construction and effect of the policy. The language of the policy in every one of the cases cited was materially different from the language of the policy in this case; no one of them, therefore, is in point with, or an authority for the decision of, the present case: for every contract must be construed according to its own particular terms and import, without reference or analogy to those of others. When the extremely large and comprehensive terms of this policy are considered, it will appear that there has been neither a deviation from, nor an abandonment of, the voyage insured in this case. [*Bayley*, J. 'In order to make the insurer liable, the ship must be in the prosecution of the voyage insured, at the time when she is lost. The voyage insured here is from *New South Wales* to *South America* or the *East Indies*. Can it be said that the ship was in the prosecution of either of those voyages, when she was returning from *New Zealand* to *New South Wales*?] She was sailing "backwards and forwards, and forwards and backwards, to and from ports and places between *New South Wales* and *South America* or the *East Indies*," within both the letter and the spirit of the policy; she had not yet made her election to which of her two ultimate destinations she would go, nor was she bound to do so: she had a perfect right to sail "backwards and forwards, and forwards and backwards," in the meantime, and to be protected by the policy in so doing. Those are the important words which distinguish this case from all that have been cited; and that distinction has been recognised and allowed; for in *Mellish v. Andrews* (a),


(a) 16 East, 312.

where it was held, that the retouching at one port, after having gone from thence to a more distant port, was a deviation; it was further held, that if the policy had been to any and all ports and places in the *Baltic*, forwards and backwards, and backwards and forwards, it would have been otherwise. That is an express decision in favour of the present plaintiff: and upon that authority it seems to follow, that the present action is maintainable.

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ABBOTT, C. J.—I think it is impossible to say that this vessel was prosecuting the voyage insured, or acting in any degree in connection with the objects of that voyage, within the language or meaning of the policy, when she was *sailing*, for it is not pretended that she was “trading” from *New South Wales* to *New Zealand*, and from *New Zealand* back to *New South Wales*, in which latter trip she was lost. I was of that opinion at the trial, and I am of the same opinion now. The words of the policy are large, undoubtedly, but they must be taken to have been used with a reasonable intent, and a reasonable import must be given to them. In order to bring this loss within the policy, it must be contended that the ship was at liberty to make intermediate voyages, totally unconnected with her ultimate destination, between her arrival at *New South Wales* and her setting out for *South America* or the *East Indies*. I think she had no such liberty, and that it would be putting a very forced and unreasonable construction upon the policy to hold that she had. I think her liberty was confined to the accomplishment of the object of her ultimate destination, which was a *trading* voyage from *New South Wales* to *South America*, or to the *East Indies*. She was clearly not pursuing the accomplishment of that object, in taking a party of missionaries from *New South Wales* to *New Zealand*; much less was she pursuing it, in returning from *New Zealand* to *New South Wales*. There was clearly a deviation, therefore, from the voyage insured, and the effect of that is to discharge the underwriters.

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BAYLEY, J.—I am also of opinion that this is a plain case of deviation from the voyage insured. This was not a time policy, but a policy covering a particular voyage; and the ship was not in any degree engaged in the prosecution of that voyage when she was lost. It is quite clear, from the amount of the premium, that the parties did not intend to give the ship the liberty which it is contended she had; and if we were to construe the policy in the mode suggested on the part of the plaintiff, we should be imposing upon underwriters an unlimited and indefinite liability, instead of a certain, limited, and defined one; which would be most unreasonable.

HOLROYD, J., concurred.

LITLEDALE, J., was gone to chambers.

Rule discharged.

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The KING v. The JUSTICES of the Borough of
LEICESTER.

After the determination of the Court, upon a rule nisi, for a mandamus, the question decided, cannot be again discussed, as a special case, until there is a return made to the writ.

LAST term the Court decided on motion, that a mandamus would lie to the justices and the clerk of the peace of a borough, to permit the attorney on behalf of certain persons, contributors to the county rate, to inspect and take copies of the last two rates made for the borough, and all orders made for the expenditure of the same, and the several orders of sessions made thereon, and all other proceedings, and documents relating thereto (a).

Tindal now moved to set down a special case for argument, for the purpose of having the question so decided, more solemnly determined, but

(a) Vide ante p. 370.

The COURT said, this could not be permitted. The justices might make their return to the mandamus, and then the question might be discussed, but the Court having already determined the question on the rule nisi, they could not suffer it to be again discussed, until a return was made.

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Tindal took nothing by his motion.

EDWARDS v. BOWEN.

Friday,
 3rd February.


THIS was a rule calling upon the plaintiff to shew cause why a writ of certiorari which he had sued out to remove the proceedings in an action of replevin from the sheriff's court of *Caarmarthen* into this Court, should not be quashed. The affidavit upon which the rule was obtained, merely stated that no affidavit had been filed in this Court, in support of the plaintiff's application for the writ of certiorari.

This Court, in its discretion, will not allow the plaintiff to remove a replevin cause by certiorari, *per saltum*, from the sheriff's court of *Caarmarthen* into this Court; for certiorari lies of course only to inferior courts of record, and the sheriff's court is not a court of record for the purposes of a plaint in replevin:—the proper course is to remove it first into the court of great sessions by re. fa. lo.

Taunton and *Chilton* shewed cause, and contended that the writ of certiorari had issued regularly. In *Goodright v. Dring* (a), it was held, upon a motion similar to the present, that certiorari would lie to remove an ejectment cause from the city and county of *Norwich*, into this Court; and there *Bayley, J.*, said, "In *Tidd's Practice* it is laid down broadly that the writ of certiorari lies for the removal of all causes from inferior courts." So, in *Pater-son v. Eades* (b), it was held, that certiorari would lie to remove an ejectment cause from the mayor's court of *Winchester* into this Court. It will perhaps be urged that this cause should have been removed by writ of recordari facias loquelam, issued out of the court of Chancery; but

(a) Ante vol. ii. 407.

(b) Ante vol. v. 445.

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on application for that purpose being made to that court, it would be objected that there being no cursitor for *Wales*, it could not be possible to direct the writ to the sheriff: so that unless certiorari lies, there will be no mode of removing the cause at all. [*Abbott C. J.* It may be removed into the court of great sessions]. The plaintiff wishes to remove it into this Court, and he is entitled to the privilege of so doing. The nature of the action, and the description of the court in which it is brought, are immaterial, none of the books of practice notice any restriction in those respects: they all lay it down generally that certiorari lies to remove all suits from all inferior courts, and they specially mention replevin suits as removeable by certiorari, upon motion. *Tidd*, 394, et seq. 6th ed.; *Gilb. Repl.* 122, 149. With respect to the cause of removal, no objection can be raised upon that, for the plaintiff has sworn that the title to the land will come in question in the cause; and though it certainly has been held that a suit cannot be removed by certiorari from a county palatine or from a court of great sessions in *Wales*, without some special cause assigned, *Zink v. Langton* (a), *Williams v. Thomas* (b), *Wilkinson on Replevin* (c); yet as the writ is a beneficial writ, slight cause has been always held sufficient, especially where the removal is at the instance of the plaintiff: *Rex v. Eaton* (d), *Daniel v. Philips* (e), *Rex v. Jukes* (f).

Russell, contrà, was stopped by the Court.

ABBOTT, C. J.—Mr. *Tidd's* definition of the writ of certiorari is this:—"The writ of certiorari is a writ issuing sometimes out of Chancery, and sometimes out of the King's Bench, or Common Pleas; and lieth where the king would be certified of any record, which is in the treasury, or in the

(a) 2 Doug. 748.

(c) 35.

(e) 4 T. R. 499.

(b) 2 Doug. 750, n.

(d) 2 T. R. 89, 285.

(f) 8 T. R. 536.

Common Pleas, or in any other court of record" (a). He therefore confines the writ, generally, to the removal of causes from inferior courts of record; and there is no doubt that the general rule and practice has been so. Now, the sheriff's court, (for the purpose of a replevin suit commenced there by plaint) is clearly *not* a court of record. It may be matter of discretion for this Court, where the plaint has been removed, as in this case, by certiorari, whether they will quash the rule or not, as some of the authorities cited shew; but in the present case, I think we ought in the sound exercise of that discretion, to quash the writ, for I see no reason why we should allow the plaintiff to come per saltum and remove his suit by certiorari from the sheriff's court into this court, without first removing it, by recordari facias loquelam into the court of great sessions, which is a fit and competent jurisdiction for the trial of it.

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The other Judges concurred.

Rule absolute.

(a) Tidd, 394, 6th ed.

GALE v. LAURIE and others.

Saturday,
4th February.

PROHIBITION. The declaration stated that by the 55 Geo. 3, c. 159, entitled, "An act to limit the responsibility of ship-owners in certain cases," it was amongst other things enacted, that no person or persons who was, were, or should be owner or owners, or part owner or owners of any ship or vessel, should be subject or liable to answer for or belonging to the owner, constitutes a part of the ship and her appurtenances, within the 53 Geo. 3, c. 159, and is liable for damage to another ship. S. 1, of the 53 Geo. 3, c. 159, is to be construed as if it contained the words, "with all her appurtenances," like s. 7.

Whatever is on board a ship for the accomplishment of the objects of the voyage and adventure in which she is engaged, be-

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make good any loss or damage arising or taking place by reason of any act, neglect, matter or thing, done, omitted, or occasioned, without the fault or privity of such owner or owners, which might happen to any other ship or vessel; or to any goods, wares, merchandise, or other things, being in or on board of any other ship or vessel, further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage which might be in prosecution or contracted for, at the time of the happening of such loss or damage; that on the 9th March, 1820, plaintiff was owner of a ship or vessel called the *Dundee*, then sailing on the high seas, bound on a certain voyage to the *Greenland* fisheries, with certain fishing stores on board thereof, consisting of harpoons, lances, spears, and whale-lines, for the purpose of catching whales and other fish on the said voyage, and casks and cisterns for containing the oil and blubber proceeding from the said whales and other fish; that the *Dundee* did there, without the fault or privity of such owner, come in collision with and sink a certain other ship or vessel called the *Princess Charlotte*, then also sailing on the high seas, bound on a certain voyage to the port of *London*, of which ship the defendants were owners; that defendants entered an action in the High Court of Admiralty, and thereupon the *Dundee*, her tackle, apparel and furniture, were valued at the sum of 2,685*l.*, and the fishing stores at the sum of 2,236*l.*, and bail was given in the sum of 9,000*l.*, without prejudice to, and expressly reserving, the question as to the liability of the plaintiff in such action beyond the sum of 2,685*l.*, the agreed value of the *Dundee*, her tackle, apparel, and furniture; that although the court of admiralty had no power or authority under the statute aforesaid, or any other statute or law of this realm, or otherwise, to make the fishing stores of any ship or vessel liable, &c.; (pursuing the words of the statute), yet the court of admiralty had decreed the said fishing stores on board the *Dundee* to be liable to contribution, against the

form and effect of the said statute; and defendants did not cease to prosecute their suit in the said court of admiralty, to the damage of plaintiff, and against the king's writ of prohibition to them delivered; &c. Plea, that a consultation ought to go, because the said fishing-stores were and are part and parcel of the said ship or vessel, appurtenances and freight, according to the true intent and meaning of the said statute, and that the value of the said fishing-stores did form part of the value of the said ship or vessel, appurtenances and freight, within the true intent and meaning of the said statute. Issue on the plea. At the trial before *Abbott*, C. J., at the *London* sittings, the jury found a special verdict, in substance as follows:—At the time of the passing of the said statute, the fishing stores belonging to ships employed in the *Greenland* fisheries, consisted and still consist of harpoons, lances, spears, lines, boats, and various other things, for the purpose of catching whales and other fish, and of casks for containing and bringing home the blubber and oil proceeding from the whales and other fish caught during the voyage; and the value of the casks was, and generally is, one half of the whole value of the fishing stores. In the outward voyage of such ships, the casks were and are carried out on board, ready for receiving the blubber and oil, and are used for several voyages; but in ships employed in the *South sea* fisheries, which are provided with similar fishing stores, the staves and hoops of the casks, were and are carried out in packs, and were and are made up into casks in the *South seas*; and the oil obtained by such ships, when brought home, was and is sold in the casks, the purchaser purchasing and paying for the casks with the oil. By the usage of trade, where policies of insurance have been effected on ships, their tackle, apparel, munition, and furniture, employed in the *Greenland* fisheries, and losses have happened to such ships and their fishing stores, the stores have not been, and are not covered by such policies, nor has a loss upon the fish-

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ing stores been paid for by the underwriters of ships having them on board, and when a particular average loss has happened upon any such policy, the fishing stores have not contributed to such average; but it is the practice that such fishing stores are insured by separate policies or separate valuations; and such custom and usage of merchants existed long before the passing of the statute. It is usual for ships employed in the *Greenland* fisheries during the fishing seasons, to make intermediate voyages to the *West Indies* and *Honduras*, or the *Baltic*, or to be used in the coasting trade of *England*, and when such ships go such intermediate voyages, or are so employed in the coasting trade, the fishing stores are all landed and left behind; and the ships, while employed in the *Greenland* fisheries, are in all respects fitted and equipped with tackle, apparel, boats, and stores for the ordinary purposes of navigation, and have every thing belonging to ordinary ships, and are in all respects capable of navigating the seas and performing voyages independently of and without the fishing stores. According to the usage of the herring fishery upon the east coast of this kingdom, and so northward, the owners or masters of the ships so employed have provided one share of the nets and other fishing stores put on board, and the crews have provided the remaining shares; but when such ships have been hired by merchants for the fishing season, as has frequently been the case, one share of the nets and fishing stores has been provided by the owners, another by the crews, and the remainder by the merchants; and the usage of the herring fishery was the same before, and at the time of the passing of the statute.

Campbell, for the plaintiff. Upon the argument of this case in the admiralty court, Lord *Stowell* certainly was of opinion that the fishing stores of the *Dundee* were liable as well as the vessel; but there are some facts, and especially that of the custom and usage of trade, for the

fishing stores to be considered separately from the ships themselves, found by the special verdict in the cause in this court, which were not brought before the notice of that learned judge, and would probably have induced him to form a different opinion. The only principle upon which the fishing stores can be held liable, is by considering them as part, or as one of the appurtenances of the ship; and it is impossible so to consider them. The first section of the earlier statutes, 7 *Geo.* 2, c. 15, and 26 *Geo.* 3, c. 86, limits the responsibility of ship-owners to "the value of the ship, with all her appurtenances." The corresponding section of the subsequent statute, 53 *Geo.* 3, c. 159, is certainly somewhat different; the limitation there is to "the value of the vessel," only omitting the words, "with all her appurtenances." But subsequent sections of the last statute, contain the same language found in the first section of the former statutes; and as all the statutes are in *pari materiâ*, and have one common object, they must be construed alike, and the limitation of responsibility must be taken to be the same in all. Then, the responsibility being confined to the value of the ship, with all her appurtenances, the only question is, whether the fishing stores of a whale ship are some of her appurtenances. Now the appurtenances of a ship are such things only as are necessary to render her navigation through the water complete, namely, in the language of policies of insurance, and other documents relating to ships, her tackle, apparel, and furniture. But a whale ship is complete for all the purposes of her navigation through the water, without her fishing stores; and the fishing stores cannot, in any proper sense of the term, be called her tackle, apparel, or furniture. The fishing stores are appurtenant to the cargo, not to the ship; they are in fact part of the cargo; they have no connection with the ship, and are of no utility towards her navigation; they are on board the ship accidentally, not incidentally, and are totally separate from, and independent of her. A bill of sale of a ship,

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would describe her with all her appurtenances; and yet the fishing stores of a whale ship would not pass under such a description. [*Bayley, J.* 'I am by no means prepared to admit that to be correct as a general proposition. Suppose such a ship were sold while at sea, when she had her fishing stores on board, would they not pass there under the description of appurtenances? I am inclined to think they would']. Part of the fishing stores consists of casks, which cannot be deemed appurtenances of the ship; they are part of her outward cargo; they are *goods*, and are carried on board as such. Suppose, that the ship belonged to one person, and the fishing stores to another, (a very probable case); how could they then be called appurtenances of the ship? The fishing stores of a whale ship are not like the machinery of a steam vessel: remove the machinery, and the steam vessel cannot go to sea at all, she is perfectly unnavigable; but remove the fishing stores, and the whaler can go to sea, and is perfectly navigable as before. These statutes were all passed for the benefit and protection of ship-owners, and are to be construed favourably for their interest; *Wilson v. Dickson* (a), and *Cannan v. Meaburn* (b). The special verdict finds, that by the usage of trade the fishing stores are not covered by policies effected on *Greenland* ships, their tackle, apparel, munition, and furniture, but are insured by separate policies, or separate valuations. Now, the usage of trade ought in some measure to regulate the construction of these statutes, which were made for the protection of the trade, as it does the construction of policies of insurance. In *Park on Insurance* (c), it is said, "in the construction of policies no rule has been more frequently followed than the usage of trade;" and in *Marshall on Insurance* (d), it is said, "the usage of trade often controls the general construction of the policy; and what shall or shall not be protected as part of the ship and fur-

(a) 2 B. & A. 2.

(c) 33.

(b) 1 Bing. 243, 465.

(d) Vol. ii. 626.

niture, depends, in some cases, on the usage of a particular trade. As where an insurance was made, in the usual form, on a ship employed in the *Greenland* fishery; and in an action on the policy, the question was, whether the fishing tackle was included in the insurance on the ship, furniture, &c. Lord *Mansfield* said, that there was no doubt but that the boats and rigging, and stores belonging to the ship, were included; and as to the fishing stores, it must depend on the usage of the trade^(a). Here the usage is found to consider the fishing stores, not as appurtenances. Nothing can properly be called appurtenant to a ship, which is not fixed to her, which these fishing stores are not; and with respect to the casks in particular, they cannot be appurtenances at any time, for as they are clearly part of the cargo when they are brought home full, they must be equally part of the cargo when they are carried out empty.

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Tindal contra. The fishing stores are part and appurtenances of the ship, within the meaning of the statutes, and the words of the special verdict. Before these statutes passed, ship-owners were liable by the common law to the full extent of damage occasioned by their vessels, whether it exceeded the value of the ship or not. The first two statutes confine their liability, in express terms, to the value of the ship, with all her appurtenances; and it is admitted that the last statute must be construed to have the same intent and meaning. Now the value of the ship with all her appurtenances, must mean the value of all the property which the owner possesses in the ship; independently, of course, of the cargo, which is no part of the ship, and generally belongs to a different owner. Then, are the fishing stores part of the ship, or part of the cargo? One or the other they must be. But a ship prosecuting an outward voyage in the *Greenland* fishery, has no cargo; she earns no freight; she takes out nothing that

(a) *Hoskins v. Pickersgill*, E. 23, G. 3.

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comes under the denomination of goods, or of cargo : she goes to no place, where any cargo could be delivered, or any of the objects of trade could be carried on. Here, the fishing stores and the ship belong to the same owner, and are devoted to the same purpose. Without the fishing stores, the ship would be wholly inadequate to the accomplishment of the very object of her voyage ; for though she might, certainly, be navigated to the place of her destination, she would be perfectly useless when she arrived there, and might just as well remain at home. On the other hand, without the ship, and except as appurtenant to her, the fishing stores would be equally useless. It follows, then, that the casks, and the cisterns, the harpoons and the boats, with all the other implements which are used in the prosecution of a voyage in the *Greenland* fishery, are as much the appurtenances, the tackle, apparel, and furniture, in short, a part of a *Greenland* ship, as are the guns of a privateer, the cabins of a packet boat, or the machinery of a steam vessel. What is the fair and ordinary meaning of the word “ appurtenances ? ” Lord *Stowell*, in his able judgment in this very case, thus defines it :—
“ A cargo cannot be considered as appurtenances of the ship, being that which is intended to be disposed of at the foreign port for money, or money’s worth, vested in a return cargo. Its connection with the ship is merely transitory, and it bears a distinct character of its own. But those accompaniments that are essential to a ship in its present occupation, not being cargo, but totally different from cargo, though they are not direct constituents of the ship ; (if indeed they were, they would not be appurtenances ; for the very nature of an appurtenance is, that it is one thing which belongs to another thing) ; yet, if they are indispensable instruments, without which the ship cannot execute its mission, and perform its functions ; they may, in ordinary loose application, be included under the term ship, being that which may be essential to it, as essential to it as any part of its own immediate machi-

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nery." Again:—"Appurtenances is a word of wider extent than furniture, and may be properly applied to many things that could not be so described." And again; "The word appurtenances must not be construed with a mere reference to the abstract naked idea of a ship; for that which would be an incumbrance to a ship one way employed, would be an indispensable equipment in another, and it would be a preposterous abuse to consider them alike in such different positions. You must look to the relation they bear to the actual service of the vessel." Now, if the definitions there given of cargo, and of appurtenances, are correct, two conclusions follow; first, that these fishing stores are not comprehended under the word cargo; and second, that they are comprehended under the word appurtenances; and the first of those is sufficient for the present argument, because, as has been already observed, they must come under the one or the other denomination. Further, if the distinction there taken between furniture and appurtenances, is well founded, that is at once an answer to the case and dictum cited from Serjeant *Marshall*; because the insurance in that case was upon the ship and furniture: besides, that which may be a very sound rule of construction upon a policy of insurance, which is a contract between man and man, is utterly inapplicable to an act of parliament, which is a rule of conduct for the public at large. These statutes must be construed, as all others of a similar kind are, not in favour of a particular body of men, but with reference to the object for which they were enacted, and with a due regard to the interests of the community; and as their object is to render all articles of property which are appurtenant to a ship, liable for the damage which the ship may occasion, and as they themselves contain no description or enumeration of those articles, the general terms which they use must be construed, as the language of all remedial acts is construed, as largely as possible for the effectuating their object, and for the protection of the public. This is the

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rule of construction laid down by all the writers of authority from Lord *Bacon* downwards; and there can be no reason why it should be overstepped in favour of those concerned in this particular kind of trade, or for the special protection of this particular species of property, especially when by so doing the general interests of society would be endangered.

The case was argued at the sittings before last *Easter* term, when the Court took time to consider of it. Judgment was now delivered by

ABBOTT, C. J.—This case came before the Court upon a special verdict found in a suit brought by the owner of a vessel called the *Dundee*, against the owner of another vessel called the *Princess Charlotte*. The suit, in this Court, was for a prohibition against execution, which was about to be issued against the owner of the *Dundee*, in favour of the owner of the *Princess Charlotte*, in the court of admiralty, in a suit which had been instituted in that court for the recovery of damages sustained by the loss of the *Princess Charlotte*, which was run down and sunk by collision with the *Dundee*. The question arose upon the statute 53 *Geo. 3*, c. 159, intituled, “An Act to limit the responsibility of ship owners in certain cases.” At the time of the collision, which happened without the fault or privity of the plaintiff, the *Dundee* was sailing outwards upon a voyage for the *Greenland* fishery, having on board the necessary stores and implements for taking whales and other fish, and for procuring and bringing home the oil and blubber obtained from them. In the court of admiralty, a valuation was made of the fishing stores, distinct from the value of the ship itself. There was no question as to the cause of the collision, nor as to the responsibility of the plaintiff, independently of the limitation of that responsibility under the statute. The judgment of the court of admiralty was against the plaintiff, both as to the value of the ship, and the value of the fishing stores. It was

contended that the plaintiff was not answerable in respect of the value of the latter; and upon that ground a prohibition was applied for. The plaintiff declared in prohibition, and the cause came on for trial, when a special verdict was found, the substance of which was this. (Here his Lordship recapitulated the substance of the special verdict, and then proceeded). Upon these facts found, we are of opinion that the present plaintiff, the owner of the *Dundee*, is responsible for the value of the fishing stores, as well as for the value of the ship. The first section of the statute, 53 Geo. 3, c. 159, confines the liability of the ship-owner to the value of the ship only, without mentioning her tackle, apparel, furniture, or appurtenances. But these latter words are used in subsequent clauses of that statute, I think not less than ten times; and for that reason, and for the reason also that both the former statutes, 7 Geo. 2, c. 15, and 26 Geo. 3, c. 86, in their first section, extend the liability to the value of the ship, *with all her appurtenances*, we think the first section of the latter statute must be construed as if it contained those words. The statutes are all in *pari materia*, and there can be no reasonable doubt that the object and intention of the legislature in the last, so far as regarded the liability of the ship-owner, was the same as in the two preceding. The first section of the statute upon which this question arises, is, therefore, to be understood and construed the same as if the words, "and all her appurtenances," were inserted in it; supposing the insertion of those words would make any real difference in the sense and meaning of the clause. These statutes were certainly passed with a view to encourage persons to become owners of ships in conformity with the provisions contained in them; but as their effect is to take away or abridge a right of recovering damages previously enjoyed by all the subjects of the realm at common law, there is no reason or propriety in seeking after a construction of them more favourable to the ship-owner, than the plain import of their language seems to dictate.

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The ship in question was in the prosecution of a voyage in respect of which no freight would become due, or could be earned; the fishing stores were not carried on board the ship as merchandise, but for the accomplishment of the objects of the voyage or adventure: and we think that whatever is on board a ship for the accomplishment of the objects of the voyage and adventure in which she is engaged, belonging to the owner, constitutes a part of the ship "and her appurtenances," within the meaning of this statute, whether the object of the voyage be warfare, conveyance of passengers or goods, or the fishing trade. We think this construction of the statute will furnish a fair and intelligible general rule; whereas, if it were to be held that nothing could be considered as part of the ship which is not necessary for her navigation or motion through the water, many nice and difficult questions would arise, and much litigation would be created. It is true, in respect of cases of insurance, these stores are not considered as covered by an ordinary policy on the ship; but insurance is a matter of contract, and the construction of the contract depends in many instances on usage. The construction of a policy of insurance furnishes no rule for the construction of this act of parliament, which was passed for purposes of a very different nature. Our opinion in the present case is formed with respect to a particular vessel, engaged in the *Greenland* trade, and with reference to her particular state at the time the accident happened; and it is not necessary for us to express any opinion on particular cases of vessels, fitted out in a different manner, or for different purposes, until some question arising out of such a case shall come judicially before us. The judgment of the Court, therefore, is to be entered for the defendant in this cause. It is satisfactory to us to know that the state of the record in this case is such, as to furnish an opportunity of correcting our judgment, if it should be deemed erroneous.

Judgment for the defendant.

Sir CARNABY HAGGERSTON, Bart. v. HANBURY the elder and HANBURY the younger, esqrs.

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HIS Honor the Master of the Rolls sent the following case for the opinion of this Court:—

By indenture, dated 10th *October*, 1721, the hereditaments and premises in question, in this cause, were demised to certain persons, their executors, administrators, and assigns, for the term of 300 years from the date of the said indenture, upon certain trusts.

In *April*, 1780, Sir *Carnaby Haggerston* was tenant in tail male in possession of all the said hereditaments and premises, subject to the said term of 300 years, which was then outstanding in the said trustees.

By indenture, dated 14th *April*, 1780, duly made and executed by and between the said Sir *Carnaby Haggerston* of the first part, *John Letteny* and *Smith Burke* of the second part, and *John Silvertop* of the third part; it was witnessed, that for barring, docking, and extinguishing all estates tail, and all reversions and remainders thereupon expectant, of and in the manors and hereditaments therein mentioned, and for limiting the same unto and to the use of the said Sir *Carnaby Haggerston*, his heirs and assigns, for ever; and in consideration of 10s. to the said Sir *Carnaby Haggerston*, paid by the said *John Letteny* and *Smith Burke*, he the said Sir *Carnaby Haggerston* did grant, bargain, and sell unto the said *John Letteny* and *Smith Burke*, and to their heirs and assigns, the said hereditaments and premises, and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits, and all the estate, right, title, interest, use, trust, property, claim, and demand at law and in equity,

Tenant in tail, in possession of hereditaments and premises, subject to an outstanding term, by indenture, for the barring all estates tail and all remainders thereupon expectant, and for limiting the same to himself, his heirs and assigns for ever; and in consideration of ten shillings to him paid, granted, bargained, and sold, the said hereditaments and premises and the reversion, remainder, &c., thereof, to L. and B., their heirs and assigns, to hold to them, their heirs and assigns, to the use of L., that he might become tenant of the freehold, in order to suffer a recovery. The deed was duly

inrolled as a bargain and sale: Held, that by that deed L. became solely seised of the premises, so as to be a good tenant of the freehold for suffering a recovery of the entirety of the premises.

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of the said Sir *Carnaby Haggerston*, of, in, and to the said hereditaments and premises, and every part and parcel thereof, with the appurtenances; to hold the same unto the said *John Letteny* and *Smith Burke*, their heirs and assigns, to the use of the said *John Letteny*, his heirs and assigns for ever, to the intent that he might become perfect tenant of the freehold of the said premises, in order to suffer a common recovery thereof, and that the said recovery should enure to the only proper use and behoof of the said Sir *Carnaby Haggerston*, his heirs and assigns for ever.

The said indenture of 14th *April*, 1780, was, after the return of the writ of seisin, duly inrolled as a bargain and sale, within the statute 27 *H. 8*, c. 16.

In *Easter* term, 20 *G. 3*, a recovery of the premises in question was suffered, wherein *John Silvertop* was demandant, *John Letteny* tenant, and Sir *Carnaby Haggerston* vouchee.

The question for the opinion of the Court is, whether the said *John Letteny* became solely seised of the said hereditaments and premises comprised in the said indenture of 14th *April*, 1780, so as to be a good tenant of the freehold for suffering a recovery of the entirety of the said hereditaments and premises.

Tinney, for the plaintiff. The question submitted to the consideration of the Court, must be answered in the affirmative. By the deed of 14th *April*, 1780, *Haggerston* granted, bargained, and sold, to *Letteny* and *Burke*, the hereditaments and premises, and the reversion, &c. The reversion, therefore, passed by grant, for the words used are sufficient for that purpose; and that they are used with that intent is clear, because the use is limited to *Letteny* alone, to make him a perfect tenant to the præcipe, which could not be the case if the deed had operated as a bargain and sale. Every deed must be construed as operating so as to effectuate the intent of the parties. The rule of con-

struction laid down by Lord *Hobart* in Lord *Clanricard's* case (a), and cited and approved by Lord *Hale* in *Crossing v. Scudamore* (b), and by *Willes*, C. J., in *Roe v. Tranmer* (c), applies here. He says, "I exceedingly commend the judges that are curious, and almost subtle, to invent reason and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act:" and *Willes*, C. J., in *Roe v. Tranmer*, adds, "Although formerly, according to some of the old cases, the mode or form of a conveyance was held material, yet in later times, where the intent appears that the land should pass, it has been ruled otherwise; and certainly it is more considerable to make the intent good in passing the estate, if by any legal means it may be done, than by considering the manner of passing it, to disappoint the intent and principal thing, which was to pass the land. *Osman v. Sheafe* (d). Upon this ground we go." The cases already cited, and the more modern one of *Shove v. Pincke* (e), are all authorities shewing that a deed which cannot operate strictly according to the words, is to be construed as operating according to the intent of the parties; though none of those cases are expressly in point with the present, because in all of them the deed must have been rendered void *in toto*, if construed according to the words. It is true, this deed contains the words "bargain and sale;" but they cannot make it operate as a conveyance by the Statute of Uses, instead of a grant of the reversion by the common law; for, if they could, the common conveyance to uses by lease and release, where the release universally contains the words "bargain and sale," would be rendered bad. This deed also has been inrolled as a bargain and sale; but the act of inrolment cannot operate to vest the legal estate in the releaser to uses. There are two rules of construction


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(a) Hob. 277. (b) 1 Ventr. 137. 2 Lev. 9. 1 Mod. 175.

(c) Willes, 682. 2 Wils. 75. (d) 3 Lev. 370. Carth. 307.

(e) 5 T. R. 124.

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which apply to this case, and are decisive to shew that the deed operated as a grant of the reversion. First, that where a deed may pass the land either by the common law, or by the statute, it shall be construed to operate by the common law; and second, that the land shall pass that way which will vest it at once, without any further act to be done. For the first of these rules Lord *Coke* is an authority, for he says, "where a man hath two ways to pass lands, and both be by the common law, and he intendeth to pass them by one of the ways, yet, ut res magis valeat, it shall pass by the other; but where a man may pass lands, either by the common law, or by raising of a use, and settling it by the statute, there, in many cases it is otherwise (a). *Hore v. Dix* (b), and *Salmon v. Jones* (c), will probably be cited on the other side, as authorities against the adoption of this rule, and it must be admitted, that in both those cases the grant was held to be void; but the propriety of those decisions seems to be doubtful, and in *Roe v. Tranmer* (d), *Willes*, C. J., after alluding to those cases, is reported to have said, that he did not, for his own part, understand them, and that if he had sat in judgment upon them, he should have been of a different opinion in both. *Barker v. Keat* (e), and *Roe v. Tranmer* certainly decided, that where an estate is intended to pass, and it cannot pass by the common law, it still shall pass as it may; but that does not militate against the present argument, because it leaves untouched the rule now relied upon, namely, that where an estate may pass both by the common law, and by the statute, the common law conveyance shall be preferred. In support of the second rule above mentioned, an anonymous case in *Leonard's Reports* (f), is a direct authority, for it was there held, that a deed must operate in that way in which it will first have full effect; and *Barker v. Keat*, and *Lutwich v.*

(a) Co. Litt. 49 a, and see H. & B. note thereon, 319, and the cases there collected. (b) 1 Sid. 25. (c) 2 Ventr. 318.

(d) 2 Wils. 79, and see the judgment of the Court in *Doe v. Salkeld*, *Willes*, 679. (e) 2 Mod. 250. (f) 3 Leon. pl. 39, p. 16.

Mitton (a), go fully to the same point. Here, if the deed operates as a grant of the reversion, it passes the estate immediately; but if it is to operate as a bargain and sale, the further act of inrolment was necessary in order to render it valid. Lastly, the doctrine of election does not apply to this case, because that applies only to cases where it is the intent and object of the deed to convey a beneficial interest to the grantee, and here it is quite clear that it was the intent and object of the deed that the grantee should not take any beneficial interest whatever.

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C. Cresswell, contra. The passage cited from Lord Coke (*b*), does not deserve the weight which has been attempted to be given to it. *Willes*, C. J., in *Roe v. Trimmer* (*c*), after quoting that passage, thus comments upon it:—"But that rule has not been observed for above 100 years last past; and most of the cases cited, are determined contrary to that rule. Nor does Lord Coke lay it down as a *general* rule, but he only says that it is so in *many* cases. And *Sheppard*, in his book of *Common Assurances*, who has, verbatim, transcribed the words of Lord Coke, puts a case directly contrary to this rule" (*d*). Neither is the argument founded upon the rule, that a deed shall be construed to operate that way by which it operates *instantly*, correct, or supported by the cases that have been cited for that purpose. *For's* case (*e*), is an authority to shew that the reversion in these lands may pass by bargain and sale to *Letteny* and *Burke*, if it was the intention of the parties so to pass it; and that such was their intention is clear, from their having inrolled the deed as a bargain and sale. The words of the deed are properly those of a bargain and sale, and if the parties once intended it to operate as such, it cannot now receive a different construction, even though it could not as a bargain and sale

(a) Cro. Jac. 604.

(b) Co. Litt. 49, a.

(c) Willes, 686.

(d) Shep. Touch. 83.

(e) 8 Rep. 105.

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effectuate the whole intention of the parties. *Tyrrell's* case (a). There, "*Jane Tyrrell*, widow, for the sum of 400*l.*, paid by *G. Tyrrell*, her son and heir apparent, by indenture inrolled in Chancery, bargained, sold, gave, granted, covenanted and concluded, to *G. Tyrrell*, all her manors, lands, tenements, &c., to have and to hold the said &c., to *G. Tyrrell* and his heirs for ever, to the use of *Jane Tyrrell*, during her life, &c. It was held that the limitation of the uses was void, for that an use cannot be declared upon an use." Now, there, the deed might clearly have operated as a covenant to stand seised, in which case the limitation of the uses would have been good; and it was as clearly the intention of the grantor that the limitation of the use to herself during her life should be good: and yet, because it was evidently her intention also that the deed should operate as a bargain and sale, and it had been inrolled accordingly, it was held to operate as a bargain and sale, though the uses were by those means defeated. In *Barker v. Keat*. *Lutwich v. Mitton*, and the *Anonymous* case in 3 *Leonard*, the deed was construed to operate as a bargain and sale; and there are many authorities to shew that a bargain and sale takes effect immediately upon its execution, though it afterwards becomes void if not inrolled in due time, according to the 37 *Hen.* 8, c. 16. A deed is to be construed most strictly against the grantor; but to construe this deed as a grant of the reversion, will be to construe it most favourably to the grantor. The whole intention of the parties was to make a perfect tenant to the præcipe, for the purpose of suffering a recovery; and that might be effectuated without construing the deed as a grant of the reversion. Construing it as a bargain and sale, *Letteny* and *Burke* were joint tenants, and a joint writ might have issued against them. If one of them had died before the recovery, and a writ had issued against the survivor, the deed would have vested the estate in him as surviving joint tenant, so as to make him a good tenant to the præ-

(a) *Dyer*, 155, a.

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cipe; therefore the deed must have operated as a bargain and sale. It is said by Mr. *Preston*, in his edition of *Sheppard's Touchstone* (a), that "it is far from being clear that a deed, though inrolled, and capable of effect as a bargain and sale, may not be pleaded as a grant, so that uses may arise from the person or estate of the grantee;" and therefore, in the present unsettled state of this question, the defendants are at least entitled to contend that it is far from clear that the deed can be so pleaded.

The case was argued at the sittings before last *Hilary* term. The following certificate was afterwards sent by the judges.

"This case has been argued before us by counsel, and we are of opinion that the said *John Letteney* became solely seised of the said hereditaments and premises comprised in the said indenture of the 14th of *April*, 1780, so as to be a good tenant of the freehold, for suffering a recovery of the entirety of the said hereditaments and premises.

J. BAYLEY,
G. S. HOLROYD,
J. LITTLEDALE."

(a) Page 83.

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CASE for not taking care of and re-delivering to plaintiff certain boxes containing deeds and papers belonging to plaintiff, which had been delivered to defendant to be taken care of and re-delivered to plaintiff on request: with a count in trover. Pleas; first, not guilty, and second, that the causes of action in the said declaration mentioned did

Declaration entitled generally of *Michaelmas* term. Plea, that the cause of action did not accrue within six years before

the exhibiting of plaintiff's bill:—Held, that defendant might give evidence of the day on which the bill was actually filed, in order to support his plea.

Held also, that the Statute of Limitations is a bar to an action of *trover*, commenced more than six years after the conversion, though plaintiff was ignorant of the conversion till within the six years; defendant not having committed any fraud to prevent plaintiff's earlier knowledge.

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not accrue within six years next before the exhibiting of the plaintiff's bill. Replication taking issue on both pleas. At the trial, before *Abbott*, C. J., at the adjourned *Middlesex* sittings after last term, the case was this :—The boxes in question were placed in the custody of the defendant in or about the year 1816, by the plaintiff, who having previously been declared a bankrupt, they were on the 10th *November*, 1818, delivered up by the defendant to certain persons describing themselves as the plaintiff's assignees. The writ in this action was sued out on the 26th *November*, 1824, returnable on the 29th; but the declaration was entitled generally of *Michaelmas* term. The plaintiff demanded the boxes of the defendant in *September*, 1824, and it did not appear that he knew of the defendant's having parted with the possession of them in 1818, until the defendant at the time of the demand communicated to him that fact. It was contended on the part of the plaintiff; first, that even if the plea of the Statute of Limitations was an answer to the first count, yet that it was no answer to the count in trover; for that as the plaintiff did not know of the goods being delivered up in 1818, until he demanded them in 1824, he was not bound to treat the defendant's act in 1818, as a conversion, but might recover upon the demand and refusal in 1824; and second, that the declaration being entitled generally of *Michaelmas* term, must be taken to have been filed on the first day of that term, and the defendant was not at liberty to prove the particular day when the writ was sued out, inasmuch as he had pleaded that the cause of action did not accrue within six years before *the exhibiting of the bill*, instead of before *the commencement of the suit*. The learned judge, however, being of opinion that the plea of the Statute of Limitations was a complete answer to the action, nonsuited the plaintiff.


Scarlett moved to set aside the nonsuit, and renewed both points. First, the plaintiff was not bound by the

tortious act of the defendant, committed in 1818, because he had no knowledge of it. It has, indeed, been held, in actions of *assumpsit*, that the Statute of Limitations is a bar where the breach of contract has been committed more than six years before action commenced, though the plaintiff did not discover it till within that period; but there has never yet been any such decision with reference to actions of *tort*. Second, the declaration was entitled generally of *Michaelmas* term, and therefore had reference to the first day of that term, and if so, the bill must be taken to have been exhibited within six years after the conversion. Third, if it was material for the defendant to prove the precise time when the bill was filed, he ought to have applied to the Court in an earlier stage of the proceedings to compel the plaintiff to entitle his declaration specially. *Tidd*, 6th ed. 430, 431.

ABBOTT, C. J.—I am of opinion that we ought not to grant any rule in this case. The evidence given at the trial as to the precise period or terms of the actual deposit with the defendant, was exceedingly slight and inconclusive: but it was clearly proved that when the boxes were demanded in 1824, the defendant stated that he had given them up to the plaintiff's assignees in 1818, and that he had in point of fact done so. It is true, that the declaration was entitled generally of *Michaelmas* term, but the writ was proved to have been returnable on the 29th *November*, and therefore I thought I was bound to construe the memorandum on the record with reference to the writ, and to consider the bill as exhibited on the day of the return of the writ. That being the case, the question upon the Statute of Limitations became open to the defendant, and upon that point I thought, and I am of the same opinion still, that the statute began to run from the period of the act done by the defendant, and not from the period of the knowledge of that act by the plaintiff, there being no proof of any fraud practised by the defendant in order to

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conceal that knowledge from the plaintiff. In addition to this, it must not be forgotten, that the plaintiff was clearly guilty of laches in not sooner enquiring after his property, and has therefore no ground of complaint that he is now not entitled to recover it.

BAYLEY, J.—I am clearly of opinion that this nonsuit was right. The gist of the action was the conversion. Now there was no conversion proved within six years before the commencement of the action, for as the defendant proved that the goods had been out of his possession more than six years before action brought, it followed that he could not possibly have converted them within that period. With respect to the plaintiff's ignorance of that fact, *Short v. M'Carthy (a)*, and *Brown v. Howard (b)*, are authorities to shew that that makes no difference in the time when the statute begins to run. It is true that a declaration, generally entitled, relates back, *primâ facie*, to the first day of the term; but that is properly matter of evidence; and upon the production of the writ returnable on the 29th November, the fair inference was that the bill was filed on that day.

HOLROYD, and LITTLEDALE, J.'s, concurred.

Rule refused (c).

(a) 3 B. & A. 626.

(b) 2 B. & B. 73.

(c) See *Clarke v. Hougham*, ante, vol. iii. 322, and *Howell v. Young*, post vol. viii., and the cases there collected.

DOE, on the demise of ISAAC WINTER, v. PERRATT.

DOE, on the several demises of CATHERINE VINEY,
THOMAS VINEY, and THOMAS GREENSLADE, v.
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DOE, on the several demises of JOHN SLADE and JOHN
STAINES WEBB, v. PERRATT.

THESE were actions of ejectment, brought by several persons to recover the same lands, situate in the county of *Somerset*; and a special verdict was found in each; substantially as follows.

On 16th *March*, 1786, one *Emanuel Chilcott* was seised in his demesne as of fee of certain tenements known by the name of *Truckwell* estate, being the tenements in the declaration mentioned, and being so seised thereof, on the day and year aforesaid, duly made and published his last will and testament in writing, bearing date the day and year aforesaid, and thereby, amongst other things, devised as follows:—"I give unto *John Chilcott*, my kinsman, living in *London*, 100*l.*, to be paid in one year after my decease. Also, I give unto *Mary Bishop*, my kinswoman, 20*l.* Also I give unto *Joan Winter*, my kinswoman, 20*l.* Also I give unto *Sarah Parsons*, my kinswoman, 20*l.* Also I give unto *Betty Viney*, my kinswoman, 20*l.* Also I give unto *Agnes Greenslade*, my kinswoman, 20*l.* Also I give unto *Ann White*, my sister-in-law, the sum of 20*l.* and the incomes of *Baye's* cottage, and her living in it, if she thinks proper, during her natural life. Also I give unto *Eleanor White* 100*l.*, and half of *Truckwell* estate, during her natural life. Also I give unto *William Burge*,

Devise of real estate to certain persons for life, and then "to *J. C.* or his male heir, if any, free land, not to be sold nor mortgaged; and if no male heir lawfully begotten by the said *J. C.*, then the above lands to fall to the first male heir of the branch of my uncle *R. C.'s* family; yielding and paying unto such of the daughters of the aforesaid *R. C.*, which shall be then living, the sum of 100*l.* each, at the time of the taking possession of the aforesaid estates." *R. C.* was dead when the will was

made, leaving five daughters, but no son; the eldest of those daughters had four daughters, but no son; all the others had sons: and all these were well known to the testator. *J. C.* died without issue. The fourth daughter of *R. C.* died before any of her sisters, and before the expiration of the life-estates, leaving a son:—*Held*, per *Holroyd* and *Littledale*, Js., [*Abbott*, C. J., absente], *Bayley*, J. dissentiente, that such son came within the description of "first male heir of the branch of *R. C.'s* family," and was entitled to the estates.

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my servant man, 5*l*. All the rest and residue of my goods, chattels, rights, credits, personal and testamentary estate, and also my lands, tenements, and hereditaments, I give, devise, and bequeath unto *Elizabeth Chilcott*, my dearly beloved wife, during her natural life, who I make my whole and sole executrix. And I do allow her the said *Elizabeth Chilcott*, to give what she thinks proper of her said effects to her sisters, *Eleanor White* and *Ann White*, during their natural lives, and after the above lives being expired, that is to say, *Elizabeth Chilcott*, *Eleanor White*, and *Ann White*; all the lands, rights, profits, and hereditaments of *Truckwell* estate to come to *John Chilcott*, my kinsman, living in *London*, or his male heir, if any, free land, not to be sold or mortgaged on any account whatever, but to remain in the *Chilcott's* family for land of inheritance, with two cottages, gardens, and orchard, in the parish of *Brompton Ralph*, adjoining to the aforesaid *Truckwell* estate, called by the name of *Middle Witcombe Free Land*; and if no male heir, lawfully begotten by the said *John Chilcott*, then, the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott's* family, who lived at *Hancrick Farm*; yielding and paying unto such of the daughters of the aforesaid *Richard Chilcott* which shall be then living, the sum of 100*l*. each, at the time of the taking possession of the aforesaid estates." The said *Emanuel Chilcott*, on 24th *May*, 1787, died, so seised of the said tenements, with the appurtenances, without revoking or altering his said will, and without issue, leaving the said *Elizabeth Chilcott*, his widow, and the said *Ann White* and *Eleanor White*, him surviving; whereupon and whereby the said *Eleanor White* became and was seised of one moiety of the said tenements, called *Truckwell Estate*, with the appurtenances, in her demesne as of freehold, for and during the term of her natural life; and the said *Elizabeth Chilcott* became and was seised of the other moiety of the said tenements, with the appurtenances, in her demesne as of freehold, for and during the term of her natu-

ral life. The said *Ann White*, on 9th April, 1791, died, leaving the said *Elizabeth Chilcott* and *Eleanor White* her surviving, and on 23d April, 1792, the said *Elizabeth Chilcott* duly made and published her last will and testament in writing, bearing date the day and year last aforesaid, and thereby, amongst other things, devised, and in pursuance of all and every power and powers enabling her in that behalf, gave and devised, all those the said tenements comprised in the said *Emanuel Chilcott's* will, over which she had any power of disposition, to her sister the said *Eleanor White*, and her assigns, for and during the term of her natural life. On 25th December, 1795, the said *Elizabeth Chilcott* died, so seised of the last-mentioned moiety of the tenements called *Truckwell* estate, with the appurtenances, without revoking or altering her said will, whereupon and whereby the said *Eleanor White* became and was seised of the entirety of the said tenements, with the appurtenances, in her demesne as of freehold, for and during the term of her natural life; and on 14th July, 1820, the said *Eleanor White* died, so seised of the said tenements, with the appurtenances. The said *John Chilcott*, in the will of *Emanuel Chilcott* mentioned, which said *John Chilcott* was the heir at law of the said *Emanuel Chilcott*, some time in the year 1765, intermarried with one _____, and in the lifetime of the said *Eleanor White*, in December, 1808, died, without ever having had any heir male by him lawfully begotten, and without having levied a fine, or suffered a recovery of the tenements aforesaid, with the appurtenances, or any part thereof; but the said *John Chilcott* had issue one *Sarah Chilcott*, his only daughter; and some time in the year 1789, the said *Sarah Chilcott* intermarried with one *Thomas Webb*, by whom she had issue one *John Chilcott Webb*, her only son, and on 4th April, 1810, she the said *Sarah Webb* died, whereupon and whereby the said *John Chilcott Webb* became and was the heir at law of the said *Emanuel Chilcott*. The said *John Chilcott Webb*, after the death of

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his said mother, on 13th *August*, 1814, by a certain indenture bearing date the same day and year last aforesaid, and made between the said *John Chilcott Webb* and *Louisa* his wife of the one part, and *William Gray*, late of *Crewkerne*, in the county of *Somerset*, esquire, deceased, of the other part, for the considerations therein mentioned, demised the said tenements called *Truckwell* estate, with the appurtenances, to the said *William Gray*, his executors, administrators, and assigns, for the term of 1000 years; and it was by the said indenture declared, that a certain fine sur conusance de droit come ceo, &c., with proclamations, levied of the said premises by the said *John Chilcott Webb*, and *Louisa* his wife, should enure to and to the use of the said *William Gray*, his executors, administrators, and assigns, for the said term of 1000 years, and subject thereto, to the use of the said *John Chilcott Webb*, his heirs and assigns, for ever. The said *William Gray*, on 21st *October*, 1815, duly made and executed his will, and thereby, without specifically devising, or bequeathing the said tenements, with the appurtenances, or any part thereof, after certain devises and bequests, devised and bequeathed all the residue of his real and personal estate to *John Slade*, his executors, administrators, and assigns, and appointed him sole executor of his said will; and the said *William Gray*, on 13th *August*, 1817, died, without revoking or altering the same: and the said *John Slade*, on 17th *December*, 1817, duly proved the said will, and took upon himself the execution thereof. On 2nd *April*, 1822, the said *John Chilcott Webb* died intestate, leaving one *John Staines Webb*, his only child, and heir at law. In the life time of the said *Emanuel Chilcott*, and on 17th *March*, 1780, the said *Richard Chilcott*, the uncle of the said *Emanuel Chilcott*, who lived at *Hancrick Farm*, in the said will of *Emanuel Chilcott* mentioned, died without ever having had a son, and leaving issue five daughters only, that is to say, *Mary*, born 9th *November*, 1739; *Joan*, born 1st *January*, 1741; *Sarah*, born 4th *December*,

1744; *Betty*, born 25th October, 1746; and *Agnes*, born 13th February, 1749; which said daughters were all living at the making of the will of the said *Emanuel Chilcott*, and at the time of his death; and as well the said five daughters, as the several descendants of the same hereinafter respectively mentioned, who were born before the making of the will of the said *Emanuel Chilcott*, were all well known to him at the time of making his said will. On 6th June, 1768, the said *Mary Chilcott*, the eldest daughter of the said *Richard Chilcott*, intermarried with one *George Bishop*, by whom she had issue four daughters only, that is to say, *Betty*, born 6th August, 1769; *Ann*, born 11th October, 1770; *Mary*, born 11th January, 1772; and *Anna*, born 2nd October, 1781; and the said *Mary Chilcott*, afterwards *Bishop*, in the lifetime of the said *Eleanor White*, and sometime in the year 1799, died. On 1st May, 1794, the said *Elizabeth Bishop*, the eldest daughter of the said *Mary Bishop*, intermarried with one *John Derham Perratt*, by whom she had issue the within-named *Matthew Perratt*, (the defendant), her eldest son, and heir at law, who was born on 1st February, 1795, and which said *Elizabeth Perratt*, and *Matthew Perratt*, are still respectively living. On 14th May, 1762, the said *Joan Chilcott*, the second daughter of the said *Richard Chilcott*, intermarried with one *Isaac Winter*, by whom she had issue two sons, *Thomas Chilcott Winter*, born 18th February, 1763, and the within-named *Isaac Winter*, born 15th July, 1770, both of whom were also well known to the testator; and after the death of the said *Eleanor White*, on 8th November, 1820, the said *Joan Chilcott*, afterwards *Winter*, died. In the respective livetime of the said *Eleanor White* and *Joan Chilcott*, afterwards *Winter*, to wit, on 30th December, 1817, the said *Thomas Chilcott Winter* died a bachelor, intestate, leaving the said *Isaac Winter*, his brother and heir at law, him surviving. On 3rd April, 1769, the said *Sarah Chilcott*, third daughter of the said *Richard Chilcott*, intermarried with one *Samuel Parsons*,

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by whom she had issue two sons, *James Parsons*, born 3rd October 1771, and *John Parsons*, born 4th January, 1773; and afterwards, in the lifetime of the said *Eleanor White*, on 4th August, 1813, the said *Sarah Chilcott*, afterwards *Parsons*, died; and afterwards, some time in the year 1813, the said *James Parsons* died intestate, and without issue, leaving the within-named *John Parsons*, his brother and heir at law, him surviving. On 4th August, 1764, the said *Betty Chilcott*, fourth daughter of the said *Richard Chilcott*, intermarried with one *Benjamin Viney*, by whom she had issue *Thomas Viney*, her only son, born 5th March, 1765, and the said *Betty Chilcott*, afterwards *Viney*, in the lifetime of the said *Eleanor White*, on 24th February, 1804, died leaving the said *Thomas Viney*, her only son and heir at law, her surviving. The said *Thomas Viney*, in the lifetime of the said *Eleanor White*, some time in the year 1795, intermarried with one *Catherine Philps*, by whom he had issue one son, the within-named *Thomas Viney*, who is still living, and the said *Thomas Viney* on 15th July, 1819, duly made and published his last will and testament, bearing date the day and year last aforesaid, and thereby gave and devised all his real estate to the said *Catherine Viney*, her heirs and assigns, for ever. The said *Thomas Viney*, afterwards, in September, 1819, died without revoking or altering his said will, leaving the said *Catherine Viney*, his widow, and the said *Thomas Viney*, his only son and heir at law, him surviving. The said *Catherine Viney*, after the death of the said *Eleanor White*, on 20th July, 1820, entered into the said tenements with the appurtenances, claiming the same, and was seised thereof as the law requires; and being so seised, on the within-mentioned 1st October, 1820, demised," &c., stating the demise by the lessor of the plaintiff, *Catherine Viney*, and the entry and ouster by the defendant. "And the within-named *Thomas Viney*, the son, after the death of the said *Eleanor White*, on 20th July, 1820, entered into the said tenements, with the appurtenances, claiming the same, and was seised

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thereof as the law requires, and being so seised, afterwards on the within-mentioned 1st *October*, 1820, demised," &c. stating the demise by the lessor of the plaintiff, *Thomas Viney*, and the entry and ouster by the defendant. " On 1st *November*, 1770, *Agnes Chilcott*, fifth daughter of the said *Richard Chilcott*, intermarried with *John Greenslade*, by whom she had issue *Thomas Greenslade*, her only son, born 10th *December*, 1772; and afterwards, some time in the year 1780, the said *John Greenslade* died, leaving the said *Agnes*, his widow, and the said *Thomas Greenslade*, his son, him surviving; both of whom are still living; whereupon, and whereby the said *Thomas Greenslade*, after the death of the said *Eleanor White*, on 20th *July*, 1820, entered, &c.;" stating the demise by the lessor of the plaintiff, *Thomas Greenslade*, and the entry and ouster by the defendant. " But, whether or not, upon the whole matter aforesaid, the said defendant is guilty of the trespasses and ejectments specified, or any of them, the jurors are ignorant, and thereupon they pray the advice of the Court, &c.;" concluding in the usual form.

These cases were argued, the first at the sittings after *Hilary* term, 1822, by *Jeremy* for the plaintiff, and *Bernard* for the defendant; and the second at the same sittings by *Carter* for the plaintiff, and *Bernard* for the defendant. The third being not then tried, the former stood over to wait the event of the trial, and the third was afterwards argued at the sittings after *Easter* term, 1824, by *Preston* for the plaintiff, and *Bernard* for the defendant. The judgment in all three was then postponed, under the hope that an amicable arrangement might be made among the parties; but that hope proving unfounded, and there being a difference of opinion among the learned judges who heard the arguments, they now delivered their judgments seriatim. As those judgments run to great length, and comprise a full review of all the authorities cited, bearing upon the case, it is thought unnecessary to detail the arguments here.

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LITTLEDALE, J.—The special verdict states, that *John Chilcott* is dead, never having had issue male; he took an estate either for life or in tail; and whichever he took, the remainder to his family is gone, and the devise to *Richard Chilcott's* family comes in. That is as follows: “If no male heir, lawfully begotten by *John Chilcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott's* family, paying unto such of the daughters of *Richard Chilcott*, which shall be then living, 100*l.* each, at the time of the taking possession of the aforesaid estates.” The question is, which of *Richard Chilcott's* family satisfies the language of this devise. The daughters clearly do not; they are merely the stocks from which the heirs are to emanate; it is from among the males of the family that the remainder-man must be found. It has been said, that all the males who represent the daughters of *Richard Chilcott* constitute one heir; but if the testator intended the male heir of each daughter to take a part, and altogether to constitute one heir, he certainly has not used words expressive of that intention. His language is male *heir*, in the singular number, and the *first* male heir; expressions clearly shewing that one person was meant, and one only. The question is, who is that one person? I am of opinion that *Thomas Viney*, the son of *Betty*, the fourth daughter of *Richard Chilcott*, who was born on the 5th *March*, 1765, and whose mother died on the 24th *February*, 1804, answers the description; and that he, having devised to his wife in fee, she is now entitled to recover in the ejectment, in which she is one of the lessors of the plaintiff. It is a general rule, the exceptions to which do not apply to this case, that if a person, not named, takes by purchase, he must answer the entire description of the designation of him in the deed or will; and the question is, whether *Thomas Viney* does not answer the entire description of “the first male heir of the branch of *Richard Chilcott's* family.”

First, he is an *heir* of one of the five daughters who con-

stituted the family. He was born in 1765; and in 1804, when his mother died, the particular estate which was to support the contingent remainder, still existed. Upon his mother's death, the remainder vested in him as an heir, if he answered the other descriptions of *first*, and *male*. He is a *male heir*, for he is the son of one of the daughters, without the intervention of a female, and could therefore take either by descent or by purchase. Then, is he *the first male heir*? His mother died before any of her sisters, therefore he was the first person who filled the character of heir, if heir is to be taken in that sense of the word which says, that a person cannot be heir until his ancestor is dead; and then, he unites in himself all three parts of the description, for he is heir, male heir, and first male heir.

The truth of the maxim of law, "*nemo est hæres viventis*;" has never been denied, as a general proposition. In *Co. Litt.* 378 a, it is said, "if a lease for life be made, the remainder to the right heirs of *I. S.*, *I. S.* being then alive, it sufficeth that the inheritance passeth presently out of the lessor, but cannot vest in the heir of *I. S.*, for that living his father, he is not in *rerum naturâ*, for *non est hæres viventis*; so as the remainder is good, upon this contingent, viz., if *I. S.* die during the life of the lessee." In *Archer's* case (a), the devise was "to *A.* for life, and afterwards to the next heir male of *A.*, and to the heirs males of the body of such next heir male. *A.* enfeoffed, and it was held that the right heir male of *A.* could not enter for a forfeiture in the life of *A.*, for he cannot be heir as long as *A.* lives; and that the remainder to the right heir male of *A.* was good, although he cannot have a right during his life, but it is sufficient that the remainder vests eo instanti that the particular estate determines." In *Chaloner and Bowyer's* case (b), *Bowyer* devised to his youngest son in tail, remainder to the body of his eldest son, remainder to his daughters in fee. *Bowyer* died, and the second son

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(a) 1 Rep. 66 b.

(b) 2 Leon. 70.

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died without issue, living the eldest son, who had issue, who was tenant in an assize of novel disseisin. It was contended, that though in a grant, the son, living his father, cannot take as heir by limitation, as heir to his father, because that none can be said or held heir to his father as long as the father is alive, yet by way of devise, the law shall favour the intention of the party, and the intent of the devisor shall prevail. But all the Court was strongly against it, and held, that as well in the case of a devise as a grant, all is one, and judgment was given for the plaintiff. In *Else v. Osborne* (a), A. made a settlement to the use of himself for 99 years, if he should so long live, remainder to trustees and their heirs during his life, remainder to the use of the heirs of his body, remainder to himself in fee. A. had two sons. A., and the trustees, and the eldest son, when of age, joined in a feoffment and fine to B. in fee, as a security for money; and the eldest son dying without issue, the second son filed a bill to set aside the mortgage. The Lord Chancellor said,—“ This is plainly a contingent remainder, being limited to the heirs of the body of A., who can have no heir during his life; *for nemo est heres viventis*.”

But the word *heir* is not always used in the law as meaning a person whose ancestor is dead; there are many cases in which it applies though the ancestor is living; and there, it means *heir apparent*. There are various illustrations of heirs of this kind to be found in the books; *Counden v. Clarke* (b), *Burchett v. Durdant* (c), *Darbison v. Beaumont* (d): but in all those instances, the word *heir*, from the subject matter, necessarily means *heir apparent*, and not heir after the death of the ancestor. Then, it has been urged, that as the word *heir* bears these several significations, and may mean heir apparent as well as full heir, it should be taken as such in this case; and then, that *Thomas Chilcott Winter*, the brother of *Isaac Winter*,

(a) 1 P. Wms. 387.

(b) Hob. 31.

(c) 2 Vent. 311, 313.

(d) Fortescue, 18, 22.

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one of the lessors of the plaintiff, is entitled, inasmuch as he was born in 1763, before *Thomas Viney*, and was the first born male of the branch of *Richard Chilcott's* family; and being an heir, and a male, the being the first born made him heir apparent, that is, in this view of the case, full heir, and consequently he answers the entire description of *first male heir*. There are, undoubtedly, many cases arising upon wills, where the word heir has been held to mean heir apparent. In *Burchett v. Durdant* (a), the devise was to *H.*, in trust for *R. D.*, and after his death—to the heirs male of his body *now living*, and to such other heirs male and female as he shall hereafter happen to have. The principal question was, whether the devise to the heirs of the body of *R. D.* now living, was a vested or a contingent remainder. It was contended, that a man cannot take as kin during the life of his ancestor, for *nemo est hæres viventis*; but it was resolved that it was a vested remainder, for being limited to the heirs of the body of *R. D. now living*, it was a sufficient *designatio personæ*, and the same as if he had said *heir apparent*. But that decision went upon the ground of the introduction of the words *now living*; for, independently of those words, the general doctrine was admitted: and even as the case was, *Atkyns*, C. B., and *Powell*, J., were of opinion that it was a contingent remainder, but considered themselves bound by the judgment of the House of Lords, in the case of *James v. Richardson* (b), which arose upon the same will, and where it was held to be a vested remainder. In one report of the case of *Darbison v. Beaumont* (c), it is stated that the remainder was devised to the heirs male of the body of *E. L.*, lawfully begotten. *E. L.* was living at the time of the remainder taking place; and yet it was held that the heir apparent should take. That is, undoubtedly, an authority to shew that *heir* in a will may mean *heir*

(a) 2 Vent. 311, 313.

(b) 2 Lev. 232. 1 Vent. 334. Sir T. Ray. 330. Sir T. Jones, 99.

(c) Viner. Devise. U. b, pl. 5.

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apparent, without any other words to express such an intention ; but it is an extremely short note of the case, and differs from the other Reports of it, in both of which it is stated, that it appeared by the will that *E. L.* was living, and that that was the ground of the decision (*a*). That judgment of the Exchequer was reversed by the two Chief Justices in the Exchequer Chamber, though that reversal was afterwards over-ruled in the House of Lords ; but these facts shew that there was much difference of opinion upon the point. It is not, however, necessary to question the doctrine there laid down, for it is perfectly consistent with the general rules of law. In *Goodwright v. White* (*b*), it was held, that a devise to the heir of *M.* was good as a *designatio personæ*, and that he might take in the lifetime of *M.* ; but it appeared by the will that *M.* was alive. *De Grey*, C. J., said, “ Within a century past, a more liberal construction of the words of a testator has prevailed ; and they have been generally taken in their popular sense, which is most likely to have been his meaning : ” and he goes on to cite the very cases I have noticed, as shewing that where the words *now living* are used in the will, the person called *heir* may take, though the ancestor is alive. The latter case, therefore, goes no further than the former : and does not touch the question, whether *heir* can be held to mean *heir apparent*, where there is nothing in the will indicating such an intention : and the cases, taken altogether, only decide, that where there is enough in the will to shew that the testator meant to use the word *heir* in the sense of *heir apparent*, it shall be so construed. Now, in this will there is nothing to shew that the testator meant to use the word *heir* in the sense of *heir apparent*. The word *heir* is applied generally to the descendants of all the five sisters ; no preference is shewn to any of them, or of their descendants ; they are all treated alike, and the sum of 100*l.* is directed to be paid to such of them as shall be living when the estate comes into possession : and,

(*a*) 1 P. Wms. 229. Fortescue, 18. (*b*) 2 Bl. 1010.

probably, the testator's object was to avoid shewing any preference, and for that purpose he made it contingent as to which part of the family the estate should ultimately go.

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In further considering what is the meaning of the word *heir*, it is necessary to advert to a class of cases arising out of the doctrine laid down by *Littleton*, in sections 21, 22, 23, and 24; and by Lord *Coke* in his *Commentaries* thereon, namely, that to entitle a person to claim as purchaser under a devise to heirs male or female of the body, under particular circumstances, he must shew that he satisfies the whole of the description, and that he is actual heir (*a*). I think that doctrine is correct, as far as respects the present case, and I have already given my reasons for so thinking; but a great many cases applicable to this rule have occurred, and are collected in a most ingenious and elaborate note of Mr. Hargrave, to *Co. Litt.* 24 b, and in another note to *Co. Litt.* 164 b. I do not enter into an examination of those cases, because they do not appear to me to bear upon the present; and for the decision of this question, I think it immaterial, whether Lord *Coke* was right or wrong. The point in all those cases has been, whether the person claiming was *heir* as well as heir apparent, that is, not whether he or she was heir with reference to the maxim, *nemo est hæres viventis*, but with reference to some other person being heir, and the person claiming, therefore, being neither heir as representing a deceased ancestor, or heir apparent. Lord *Coke's* Commentary on sections 22 and 23 of *Littleton*, illustrates this point. He says (*b*), "When a man giveth lands to a man, and the heirs female of his body, and dieth having issue a son and a daughter, the daughter shall inherit; for the will of the donor, (the statute working with it), shall be observed. But in case of a purchase it is otherwise, for if *A.* have issue a son and a daughter, and a lease for life be made, the remainder to the heirs females of the body of *A.*; *A.*

(*a*) *Co. Litt.* 24, 25.

(*b*) *Id.* 24 b.

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dieth ; the heir female can take nothing, because she is not heir ; for she must be both heir and heir female, which she is not, because the brother is heir, and therefore the will of the giver cannot be observed, because here is no gift, and therefore the statute cannot work thereupon." But here the question is, not whether the different claimants are heirs or not, for each of them is an heir ; that is, either an heir after the death of his ancestor, as in the case of *Thomas Viney*, who is heir to *Betty*, the fourth daughter of *Richard Chilcott* ; or heir apparent, as is the case of *Thomas Chilcott Winter*, who was heir apparent to *Joan*, the second daughter ; or heir apparent, as is the case of *Matthew Perratt*, who is heir apparent to his mother *Betty*, who was heir of *Mary*, the eldest daughter ; for each of these three persons represents an ancestor of whom they are respectively heirs, and each is an heir, in one sense or other of the word. It is not a question, who is heir to the testator, or heir to *Richard Chilcott*, but who is heir of the branch of his family, consisting of five females, each of whom was to be an ancestor from whom an heir was to spring. I have not particularly noticed the claim of *Matthew Perratt* ; it is open to the same objection as that of *Thomas Chilcott Winter*, because, though his mother *Betty* became heir to her mother *Mary*, on the death of *Mary*, yet *Betty*, his mother, is still living ; and therefore he does not, even now, fill the character of heir, and his claim cannot be supported.

Upon the whole, I think the case resolves itself into this, whether the word *heir*, in this devise, is to be taken to mean heir of a deceased ancestor, or *heir apparent* ; and as I think it means heir of a deceased ancestor, I am of opinion that judgment should be given for the plaintiff on the count on the demise of *Catherine Viney*, in the ejectment in which she and *Thomas Viney*, and *Thomas Greenslade*, are lessors of the plaintiff ; and for the defendant on the other counts in that ejectment, and generally in the two other ejectments.

HOLROYD, J.—The claims of the parties in these ejectments, arise upon the will of *Emanuel Chilcott*, made 16th March, 1786. By that will, after giving half of *Truckwell* estate, the estate in question, to *Eleanor White* during her life, and the other half, inter alia, to *Elizabeth Chilcott*, his wife, during her life, with power to give what she thought proper to her sisters, *Eleanor White*, and *Ann White*, for their lives, he devised thus:—"And after the above lives being expired, that is to say, *Elizabeth Chilcott*, *Eleanor White*, and *Ann White*, all the lands, rights, profits, and hereditaments of *Truckwell* estate, to come to *John Chilcott*, my kinsman, living in *London*, or his male heir, if any, free, not to be sold nor mortgaged on any account whatsoever; but to remain in the *Chilcott's* family for land of inheritance, with two cottages, gardens, and orchard, in the parish of *Brompton Ralph*, adjoining to the aforesaid *Truckwell* estate, called by the name of *Middle Wetcombe*, free land: and if no male heir, lawfully begotten by the said *John Chilcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott's* family, who lived at *Hancrick farm*, yielding and paying unto such of the daughters of the aforesaid *Richard Chilcott*, which shall be then living, the sum of 100*l.* each, at the time of the taking possession of the aforesaid estates." *Emanuel Chilcott*, died 27th May, 1787, leaving the above named *John Chilcott*, who was his cousin and heir at law, surviving, who afterwards dying without issue male, and in the lifetime of *Eleanor White*, his estate tail became extinct, and *Elizabeth Chilcott*, the testator's, widow, having devised her half of the *Truckwell* estate to *Eleanor White*, for her life, and *Eleanor White* having survived *Elizabeth Chilcott* and *Ann White*, and dying the 14th July, 1820, all their life estates then became extinct; and the question is, whether any, and what person is entitled to the *Truckwell* estate under the devise, by which that estate was then to fall "to the first male heir of the branch of *Richard Chilcott's* family;" or, whether that devise is

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void for uncertainty, so that the estate passes by descent to the testator's heir at law.

In order to ascertain the intention of the testator, so far as it depends upon the construction of the will, it is important to consider what was the state of things in the *Chilcott* family, at the time when the will was made; for it is laid down by *Willes*, C. J., in *Doe v. Underdown* (a), to be one of the certain and established rules for the construction of wills, that the intent of the testator should always be taken as things stood at the time of the making of his will; a rule which had previously been laid down by Lord *King*, C. J., in *Wright v. Hall* (b), and has since been confirmed by Lord *Ellenborough*, C. J., in *Doe v. Scott* (c). There were originally three branches of the *Chilcott* family; of one, the testator was the only surviving individual; the other two remained, and were both in the mind of the testator when he made this devise. One of them had consisted of his elder uncle, *John Chilcott*, who was dead, leaving only one child, the testator's kinsman, *John Chilcott*, named as such in the will, who was living at the time of making the will, having one child only, a daughter, then unmarried. Of the other branch, which the testator calls "the branch of his uncle *Richard Chilcott's* family;" *Richard Chilcott*, the testator's younger uncle, was dead without issue male, but leaving five daughters, all then married and living; and of those, *Mary*, the eldest, had four daughters, but no son, or male descendant, and each of the others had a son or sons then living. This was the state of things in the *Chilcott* family, both at the time of the testator's making his will, and of his death; and *Richard Chilcott's* daughters, and their children, were all well known to the testator. Then let us consider, what the devise is, as it respects these two branches of the family. The devise, as to the first branch, was, in my opinion, a devise to such person only, as either

(a) *Willes*. 296. (b) *Fortescue*, 182. 8 Mod. 222. *Wright v. Horne*.

(c) 3 M. & S. 306.

was, at the time of making the will, or would be at the time of the testator's death, when the will would first come into operation, the male heir of that branch, in that strict sense of the word *heir*, which the maxim, "*nemo est hæres viventis*," requires. The devisee, *John Chilcott*, was, in the strictest sense, the male heir of that branch, because his father was dead. If he survived the testator, he would be the only person to take under the devise in favour of that branch; and so it would be, if he died before the testator, supposing his male heir would take no estate by purchase, which would be the case if in the devise to him, "or to his male heir, if any," the word *or* can be construed *and*. But, construing that devise disjunctively, so that the estate to the male heir lapsed by the father dying during the testator's life, still no person could take under that devise who was not both *heir*, in the strict sense of the word, and *male*, according to the cases put by Lord Coke, in *Co. Litt.* 25 b.; and the son of *John Chilcott*, if he left one, or the son of his daughter, if she died and left one, would be the only person satisfying that description. But, according to the authorities just cited, her son could not take, unless she were dead, for he would not answer that description during her life; unless enough can be collected from the will to shew a contrary intent, which in my opinion there cannot. No male heir, but an heir male of his body, could take under the above description, either by descent or purchase: for the words, "his male heir," to be a good description in a will, to take as a purchaser, must be construed, "heir male of his body." *Co. Litt.* 27 a; *Hobart*, 32; and Lord Ossulston's case (a). So that no person could, I think, be held to take under the devise in favour of the first of these two branches of the family, unless he was, or until he became, "male heir," within the meaning of the maxim "*nemo est hæres viventis*."

This being in my opinion the effect of the devise in favour of the first branch, let us see what the devise over

(a) 11 Mod. 189. 3 Salk. 336.

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in favour of the second branch is, and how it is to be construed; and let us consider, whether the devise in favour of the first branch and the necessary effect of that devise can, and if so, how far it can, aid us in ascertaining the intent of the testator, or the legal construction and effect that is to be given to the devise in favour of the second branch. The devise over, is:—"and if no male heir, lawfully begotten by the said *John Chilcott*," that is to say, "if no *such* male heir of the body of *John Chilcott*, the devisee, as the above maxim requires," then "the above lands to fall to the first male heir of the branch of my uncle, *Richard Chilcott's* family." Now, there were, at the time of making the will, *male heirs apparent* of the bodies of the four younger daughters of *Richard Chilcott*, respectively known to the testator; yet he does not designate any person by name as the person he intended to take: which he did, as far as it could be done, in the former devise, and which he might easily have done in the devise over, if he had intended the first male heir *apparent*. Nor does he state from which of *Richard Chilcott's* daughters such male heir should be descended. But *Richard Chilcott's* heirs were then all females, and it is clear the testator did not intend the estate to go to a female heir or heirs. I consider his intent to have been, and unless the contrary appears the legal construction must, in my opinion, be, that when and as soon as there came to be a male heir, instead of a female, which could only be by there arising a male heir within the maxim, "*nemo est hæres viventis*," the estate should go to and vest in that heir; and that he contemplated the possibility of such an heir arising by the death, in the interim, of some of the female heirs, *Richard Chilcott's* daughters, is plain from the provision that the male heir, when he took possession of the estate, should pay 100*l.* each to such of *Richard Chilcott's* daughters as should be then living. The eldest daughter had no son; but she had four daughters, the eldest of whom, after the testator's death, had a son, the

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defendant, *Matthew Perratt*; but he is not even now a male heir of that branch within the maxim, for his mother is still living; and even if heir apparent is within the devise, he is the last male heir in order of birth, instead of the first. The person who first became male heir in the strict sense of those words, was *Thomas Viney*, son of *Betty Viney*, fourth daughter of *Richard Chilcott*, who on the death of his mother, on 24th *February*, 1804, in the lifetime of *Eleanor White*, and therefore during the continuance of her life estate, became heir male of the body of his mother, and her sole heir, and first male heir of the body of *Richard Chilcott* in order of time, within the strict sense of the maxim. He did not, indeed, become true and complete heir of the body of *Richard Chilcott*, within the maxim, that all the coparceners constitute but one heir; but such a male heir, as under that designation in a will, may take as a purchaser, according to *Co. Litt.* 25 b, though he claimed through a female; and though he could not, for that reason, take by descent, as *Richard Chilcott's* heir male. But the devise over is not "to the first male heir of *Richard Chilcott*," or "of the body of *Richard Chilcott*," but "of the branch of *Richard Chilcott's* family, which in my opinion must be taken to mean the first male heir of *one* of his daughters; for, otherwise, the word "first," must be rendered totally inoperative; and the provision that the male heir, when he took possession of the estate, should pay 100*l.* each to such of *Richard Chilcott's* daughters as should be then living, would become inconsistent and absurd. *Thomas Viney*, therefore, on the death of his mother, became, in my opinion, "first male heir," and was entitled to the *Truckwell* estate in remainder; and the estate in remainder having once vested in him, as such male heir, by purchase, could not be divested out of him. *Couden v. Clark* (a), *Driver v. Frank* (b). It has been contended, that *Thomas Chilcott Winter*, the eldest son of *Richard Chilcott's* second daughter, being the first

(a) Hobart, 33.


(b) 3 M. & S. 25. 8 Taunt. 468.

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born male of *Richard Chilcott's* family, was entitled to the estate, being the first born *male heir apparent* of any part of *Richard Chilcott's* family: and it has also been contended, that *Matthew Perratt*, as the first male descendant of *Richard Chilcott's* eldest daughter, answers to the description of first male heir; not as being first in order of time, but first as the descendant of the eldest daughter, and therefore most worthy. Neither of those persons can be held to have been entitled to the estate, unless it is also held, that a mere heir apparent is within this devise, for they are both heirs apparent only. Lord *Alvanley*, M. R., in *Thelluson v. Woodford* (a), in laying down the rule of construction as applicable to all wills, says, "the intention is to be collected from the whole will taken together. Every word is to have its effect. Every word is to be taken according to the natural and common import; and if words of art are used, they are to be construed according to the technical sense, unless upon the whole will it is plain, the testator did not so intend." If, therefore, it appeared plainly by the will, that the testator intended a male heir apparent to take under this devise, I admit the rules of law would not prevent us from so construing the will, as to give that intention effect. But I see no such plain intention on the face of this will; on the contrary, the testator having in the devise in favour of the first branch, used the words "male heir" in their strict legal sense, I think he must be taken to have used them in the same sense in the subsequent devise, unless a different intention appears. Where there is no manifest intention to the contrary, I apprehend the true legal construction of a devise to "heir male," "next heir male," or "first heir male," must, according to the maxim "*nemo est hæres viventis*," be such, as to exclude a mere heir apparent; and I think this rule applies to the devises to both the branches of the *Chilcott* family; and that it applies to the devise in question, the devise to the second branch, whether the

(a) 4 Vesey, jun. 329.

devise to the first branch is brought in aid or not. This is the old rule of law laid down in *Archer's* case (a), and in *Chaloner & Bowyer's* case (b); and though instances may be found in later cases, both in pleadings and special statutes, that the word *heir* includes heir apparent; still, without evidence of a contrary intent arising from the subject-matter or the context, the rule of law, I apprehend, as to deeds, and even devises, continues to be the same as formerly. I admit the dictum that has been cited from *De Grey, C. J.*, in *Goodright v. White* (c); but the cases which he quotes in support of it shew, that without something to lead to a different inference, the old rule of construction must still prevail. In *James v. Richardson* (d), the remainder was devised, after a life estate to *Robert*, "to the right heirs male of the body of *Robert now living*, and to such others heirs male and female as *Robert* should have afterwards of his body." It was held that the words "now living," referred not to *Robert* only, though he was the last antecedent, but to all, and signified *heirs male now living*; and therefore, that *George*, the son of *Robert*, who was living when the will was made, though only heir apparent, was the person intended by the word "heir," especially as the will itself took notice that *Robert*, the father, was then living. It seems clear that the latter circumstance would not of itself have been deemed sufficient, it having been held insufficient only a few years before, by the whole court of C. P., with Sir *Orlando Bridgman* at their head, in the case of *Collingwood v. Pace* (e): and even under all the circumstances, the matter was still so doubtful, that that judgment was reversed in the Exchequer Chamber. And though that reversal was eventually reversed, and the original judgment confirmed, in the House of Lords, yet there was still so much doubt and difference of opinion upon the point, that the same question was afterwards again tried, upon the same will, in the case

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(a) 1 Rep. 66.

(b) 2 Leon. 70.

(c) 2 Bl. 1010.

(d) 2 Lev. 232. 1 Vent. 334. Sir T. Ray. 330. Sir T. Jones, 99.

(e) Bridgman, 410.

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of *Burchett v. Durdant* (a), first in this Court, afterwards in error in the Exchequer Chamber, where it was argued no less than three times, and lastly in the House of Lords; though each of those Courts gave the same judgment as had been given in the House of Lords in the previous case of *James v. Richardson*. The next case was that of *Long v. Beaumont* (b), argued first in the Exchequer, then in the Exchequer Chamber, and lastly in the House of Lords, and cited, and confirmed, in the subsequent case of *Brown v. Barkham* (c). There the remainder was devised "to the heirs male of the testator's aunt, *Elizabeth Long*, lawfully begotten, and for default of such issue, the remainder to testator's right heirs." There were legacies to the aunt, and her three sons, taking notice, therefore, that they were all living; but giving also an annuity to the testator's heir. The devise was held to contain a sufficient designatio personæ, to vest the estate in the aunt's eldest son in her lifetime, and it was decided, that he was entitled to take, and that the estate should not lapse, or pass to the testator's heir. The ground of that decision was, that otherwise the will could not be carried into effect according to the testator's evident intent. As an annuity was given to the testator's heir, it was clear he did not mean his aunt to have the whole estate; and the limitation over to the testator's right heirs, was expressly "in failure of issue male of his aunt." It was also considered there, though the contrary has since been decided, that the word "begotten" in that will, was equivalent to the words "now living" in the will in *Burchett v. Durdant*. The intent, therefore, was deemed plain, that the *apparent heir male* of the body of the testator's aunt, should take before *his own heir general*, who was not to take until the extinction of all the issue male of the aunt. It was held, that it would be hard, therefore, to expound the will in that sense which was the most strict and rigorous, *and would destroy*

(a) 2 Vent. 311.

(b) 1 P. Wms. 229. 1 Bro. P. C. 490.

(c) Prec. Ch. 467.

great part of the will, at the same time that it might by law have another sense, which would support the whole will and intent of the testator; and that his intent should take place, if by any possibility it could, consistently with the rules of law. To that decision, and to the strong reasoning in support of it, I readily subscribe; but that judgment was reversed by the two Chief Justices in the Exchequer Chamber, though it was finally confirmed in the House of Lords. The maxim, “*nemo est hæres viventis*,” was again relied on in the case of a devise, in *Brown v. Barkham* (a), in Chancery; and though it was held inapplicable to that case, because there the devise did not take place till after the ancestor was dead, still the maxim itself, and its application by Lord Coke, in *Archer’s* case, was not disputed. The next case was that already mentioned of *Goodright v. White*, which was an immediate devise, subject to certain terms for years, to testator’s son *Richard*, his heirs male, and the heirs of his daughter *Margaret White*; it was held, that under the latter words the heir apparent of *Margaret White* might take in her lifetime; but the ground of the decision was the evident intent of the testator, that the heir apparent should take, and should have a present vested interest in the lifetime of the ancestor.

I have not found, nor am I aware that there can be found, any subsequent case upon this point, except one of *Buck v. Norton* (b). There the question was, what should pass under a devise of a “*messuage with the appurtenances*,” and it was held by *Eyre, C. J., Heath and Rooke, Js.*, concurring, that the word “*appurtenances*” was to be construed in its technical sense. He said, “*lands will not pass under the word appurtenances, taken in its strict technical sense. They will pass, if it appears that a larger sense was intended to be given to it:*” and he afterwards added,—“*Every testator ought to be supposed to take legal words in a legal sense, unless, according to the marginal*

(a) Prec. Ch. 461.

(b) 1 Bos. & Pul. 57.

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note to the case in *Hobart*, there be *demonstration plain*, of an intent to use them in a different sense." That marginal note is this :—"No man shall shew me a case in law where *by purchase by devise to an heir*, any may take that is not heir indeed, *without demonstration plain*" (a). *Bridgman*, C. J., had indeed cited that note as law, long before, in *Collingwood v. Pace* (b), where he said of it, "that case is put of the heir of the devisor, but the reason is the same where the same expression is used of the heir of another." In *Poole v. Poole* (c), the principle of law applicable to the construction of technical words in a will, laid down in *Goodright v. Pullyn* (d), was cited by Lord *Alvanly*, namely, "that the operation of *the plain and clear words of a settled rule of law*, should not be defeated or broken into by uncertain or doubtful words;" or, in the words of Lord *Raymond*, "that the operation of plain and clear words, *and a settled rule of law*, should not be defeated or broken into by uncertain or doubtful words." Upon the whole, it does not seem to me, that the decisions since *Archer's* case, and the case in *Leonard*, have broken in upon the rule there laid down, according to the maxim, "*nemo est hæres viventis*," except where there appears a different intent on the part of the testator, or where the adoption of that rule would defeat or destroy the will, or prevent its having effect according to the intent. I think that is not the case upon the will in question, but on the contrary, that the construction I put upon the will gives full effect to the intent of the testator; and, therefore, I am of opinion that the estate must be taken to have vested in *Thomas Viney*, as "the first male heir of the branch of *Richard Chilcott's* family:" and that there is no such uncertainty in the devise, construing it as I think the rules of law require, as to pass the estate by descent to the testator's heir at law. The result, therefore, of my judgment is, that *Catherine Viney*, the widow and devisee of *Thomas*

(a) *Hobart*, 33.(b) *Bridgman*, 413.

(c) 3 Bos. & Pul. 620.

(d) 2 Ld. Ray. 1437.

Viney, and standing in his place, is entitled to recover in the ejectment in which she is a lessor of the plaintiff, and that the defendant, by reason of his possession, is entitled to the judgment of the Court in the other ejectments.

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BAYLEY, J.—All these cases, in which special verdicts have been found, depend upon the will of *Emanuel Chilcott*. The first two ejectments are brought by persons claiming under the will, on the ground that the will, according to the construction to be put upon it, entitles them to the estate in question; and the third, by the heir at law of the testator, and a mortgagee under a former heir, on the ground that the other claimants have no right under the will, the devise under which they claim being void for uncertainty. The will was made 16th *March*, 1786, and the testator then had a cousin, *John*, the son of his elder uncle *John*, and five female cousins, the daughters of his younger uncle *Richard*. His uncles *John* and *Richard* were both dead, and he knew it. His female cousins were *Mary*, the maternal grandmother of the defendant; *Joan*, the mother of *Thomas Chilcott Winter* and *James Winter*; *Sarah*, the mother of *James Parsons*; *Betty*, the paternal grandmother of *Thomas Viney*; and *Agnes*, the mother of *Thomas Greenslade*. *Mary* never had a son, but she had four daughters, all living when the will was made; and she was then more than forty-six years old. The sons of his other cousins were all born before the testator made his will, and were all well known to him. *Thomas Chilcott Winter* was the first-born of those sons, and his mother was the eldest cousin that had a son. The testator devised a moiety of the estate in question to *Eleanor White* for life, and the other moiety to his widow for life, and gave her power to give what she thought fit to her sisters *Eleanor White* and *Ann White* for life; and then devised as follows:—"And after the above lives being expired, that is to say, *Elizabeth Chilcott*, *Eleanor White*, and *Ann White*, all the lands, rights, profits, and hereditaments of

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Truckwell estate, to come to *John Chilcott*, my kinsman, living in *London*, or his male heir, if any, free land, not to be sold or mortgaged, but to remain in the *Chilcott* family for land of inheritance: and if no male heir lawfully begotten by the said *John Chilcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott*'s family, who lived at *Hancrick farm*, yielding and paying unto such of the daughters of the aforesaid *Richard Chilcott*, which shall be then living, the sum of 100*l.* each, at the time of the taking possession of the aforesaid estate." The testator died in 1787; *Ann White* died in 1791; *Elizabeth Chilcott* devised her moiety of the estate to *Eleanor White*, and died in 1792; and *Eleanor White* died in 1820. At the death of *Eleanor White*, *John Chilcott*, the cousin, was dead without issue male; therefore, the only claim that could be made under the testator's will, was under that part which directs the estate to fall to the first male heir of the branch of *Richard Chilcott*'s family: and in order to recover under the will, the claimant must make out that he was such first male heir, within the meaning of the will. When *Eleanor White* died, *Mary*, the grandmother of the defendant, was dead; *Sarah* and *Betty* were dead also: *Joan* and *Agnes* were living. *Mary* died before *Sarah* or *Betty*, and *Betty* died before *Sarah*; and so the defendant claims to be first male heir, because he is the male descendant of the eldest cousin. *Isaac Winter* claims as heir of his brother, *Thomas Chilcott Winter*; because *Thomas Chilcott Winter* was the son of the eldest of the cousins who had a son, and because he was born before any of the other cousins had a son. *Thomas Viney* and *Catherine Viney* claim in right of *Thomas Viney*, the son of *Betty*, because he was the first among all the sons of all the cousins who filled the character of heir, inasmuch as his mother died before any of the other cousins who had a son; and *John Parsons* and *Thomas Greenslade* claim each a share of the estate, contending, that all the sons, or male descendants,

of all the cousins constitute but one heir. The heir at law claims, because, the devise admitting of so many claimants, and leaving it doubtful which of them is entitled, is void for uncertainty; and unless we are able to decide with certainty who is entitled, the claim of the heir at law must prevail. Now, if the limitation here had been to the family of *Richard Chilcott*, each of his five daughters would have taken one-fifth part of the estate, because it has been held, that under a limitation by way of remainder, in a will, to the family of *A.*, the word *family* is sufficiently certain, and the heir at law of *A.* is entitled. *Chapman's case (a)*, *Doe v. Smith (b)*, and *Wright v. Atkins (c)*. But the limitation here, being to the first male heir of the branch of that family, the question is, whether the law can give any, and what, definite meaning to the expression "first male heir." In the first place, the testator seems clearly to have contemplated some *one* individual, excluding, therefore, the construction which would let in the male descendants of all the daughters as one entire heir; and if so, the question is, whether any, and what, rule of law enables us to say, who that one individual is. Now, though sisters constitute one entire heir, still, if it becomes necessary to give a preference to any one, the law gives it to the eldest. Thus, if an advowson belongs to parceners, and they cannot agree whom to present, the right to present on the first vacancy is in the eldest, and her representatives; the right to present on the second vacancy, in the second; and so on. *Co. Litt.* 166 b, 186 b; *Harris v. Nichols (d)*: and if parceners agree that a stranger shall divide the land into shares, without agreeing in what order they shall chuse, they shall chuse according to seniority. *Co. Litt.* 166 b. But this privilege does not descend to the representatives of each, because it arises from the act and consent of the parties, and is not given them by the law, as in the case of an

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(a) *Dyer*, 333 b.

(b) 5 M. & S. 126.

(c) 17 Ves. 256.

(d) *Cro. Eliz.* 19.

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advowson. These instances, however, shew, that where it is necessary to make distinctions between persons of equal degree, as sisters, the law makes the distinction in favour of the eldest; and there are authorities which bring that rule very near to the present case. In *Co. Litt.* 25 b, Lord Coke puts this very case:—"If lands be devised to one for life, the remainder to the next heir male of B. in tail, and B. hath issue two daughters, and each of them hath issue a son, and the father and daughters die; some say this remainder is void for the uncertainty; some say that the eldest shall take it, because he is worthiest; and others say that both of them shall take, for they both make but one heir." Lord Coke has informed us, in another place, that wherever *Littleton* sets down differing opinions, he sets down his own last; and if that rule may be applied to Lord Coke, it follows that, in his judgment, the better opinion was that both should take; and the next, that the eldest should take. Whether by *the eldest* he means the son of the elder sister, or such son as either of them may first have, he does not explain; but I should say, that the law, which has respect for certainty and order, would prefer the elder sister's son, though the younger sister's son were the first born of the two. In this view of the case, the question will be, whether all the males should take jointly, or whether the whole estate should go to one; and I think, upon the true construction of the words *first male heir*, that the whole should go to one. In *Perriman v. Pearce* (a), the words "*proximo consanguinitatis et sanguinis*," were held to pass the estate to the eldest of several sisters, to the exclusion of the rest; partly, indeed, because a life estate was given to some of the others, but partly, also, because the word *proximo* applied to an individual, and not to a body or class. In Lord Hale's MSS., *Co. Litt.* 10 b, n. (2), that case is stated thus:—"testator had a son and four daughters, and devised to the son in tail, remainder to the

(a) Palmer, 11, 303.

second and third daughters for life, remainder proximo consanguinitatis et sanguinis of the testator, and *Pasch.* 17 *Jac.*, by two judges against one, the remainder vested in all the daughters, when the son died without issue, but afterwards, *M.* 20 *Jac.*, per totam curiam, it vests in the eldest daughter only, because proximo; and, secondly, because an express estate was limited to the second and third daughters. The same case is stated in 2 *Roll. Rep.* 256; *Bridgman*, 14; *Old Bendl.* 102 and 106, but those reporters give only the arguments of counsel, and not the judgment of the Court, and they seem to refer to the case as it appeared before the Court in *M.* 20 *Jac.*, and not as it was in *Pasch.* 17 *Jac.*; for according to *Palmer*, there were two cases, of those respective dates; and his statement of the former agrees nearly with Lord *Hale's MSS.*, while his statement of the latter differs materially from that, and agrees substantially with the other reports. The first report of the case in *Palmer*, 11, under the name of *Perriman v. Bifield*, states that the testator had three daughters, that he devised to the two younger for their lives, remainder proximo consanguinitatis et sanguinis, and that the issues of the two younger daughters brought trespass against the elder. *Montague, J.*, thought the elder daughter entitled to the whole; *Dodderidge*, and *Houghton, J.'s*, that she was entitled to a third only; but whether she was entitled to the whole, or a third only, the action was clearly barred, because one joint tenant cannot bring trespass against another. The second report of it in *Palmer*, 303, under the name of *Perriman v. Pearce*, states, that the testator had three wives, and eight daughters, and one son, that he devised to the younger daughter for life, remainder to the son in tail, remainder to the two daughters by the second wife for life, remainder proximo consanguinitatis de sanguine of the devisor; that the eldest daughter had two sons, *John* and *William*, and that *John* died leaving the lessor of the plaintiff his son and heir; that the two daughters of the second wife, the devisees for life,

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left issue, but the son and the other daughters were dead without issue; and the questions were, whether the issues of the three daughters should take by the words "proximo consanguinitatis, &c.," or the issue of the elder only, and if the latter, whether the son of *John* or *William*: and, after divers motions it was resolved by *Dodderidge*, *Houghton*, and *Chamberlain*, that the issue of the eldest daughter alone should take, and that *John's* son should take and not *William's*; but upon the first of these points they did not agree in their reasons. *Houghton* said, if a man had three daughters, and devised to the youngest in tail, remainder proximo consanguinitatis, the eldest shall take, for though all are in equal proximity of blood, the singular number shews only one is to take. To this *Chamberlain* agreed, and he said it had been so held in *Levitt's* case, (which I have not been able to find), and in *Chapman's* case, *Dyer*, 333, (which I have already cited); and he said a difference had been taken between propinquioribus and proximo, which *Dodderidge* denied; and *Houghton* said, had the eldest daughter in the case he put been attaint, the king should have had the whole, which *Dodderidge* denied. *Dodderidge* thought the elder daughter would only take equally with such of the other daughters as were not excluded, but he thought the two daughters to whom life estates were given were excluded, and then there was no one to take but the issue of the elder daughter. *Chamberlain* agreed in this opinion, *Houghton* not, because the life estates of the mothers, furnished no ground for withholding the inheritance from their issue; but for those different reasons they agreed that the plaintiff should have judgment. These cases shew, therefore, that in the opinions of *Montague* and *Chamberlain*, and in the corrected opinion of *Houghton*, a remainder proximo consanguinitatis of a testator, who had several daughters, would not vest in all, according to the latter opinion mentioned by Lord *Coke*, but in one only; and if *proximus* would have that effect there, I think *the first* will have that effect here;

and then the only remaining question is, whether the priority of the sisters should not be our guide in ascertaining who, upon the construction of this will, is *the first male heir*, and I am of opinion that it should. The eldest sister is the nearest in consanguinity, and when there must be a distinction, is by law entitled to rank first; therefore, the person who is male heir through her, seems to me entitled to the appellation of *first male heir*. To give the description of first to the son of the sister who first bore a son, or to the son of the sister who first died, is to decide upon chance and accident, not upon principle; and the language of the will, when considered with reference to the state of the family when it was made, shews, in my opinion, that by the words *the first*, the testator meant that the male descendant of the eldest of *Richard Chilcott's* daughters should take in preference to the male descendant of the second; and so on. But, independently of what might be the testator's intention, I am of opinion, that upon a limitation to the first male heir of several sisters, the families of the sisters must be resorted to according to their seniority; and that of several males of equal degree, he is the first male heir who is found in the eldest sister's line. Therefore, if *Mary*, the eldest sister, had had a son, though he had been younger than the sons of the other sisters, I should have thought him the first male heir; and if all the other sisters had had daughters only, and those daughters had all had sons born before *Matthew Perratt*, I should still have thought *Matthew Perratt* entitled as the first male heir. But as he is the son of a daughter and not of a son, I think he is not the first male heir, but that that character belongs to *Isaac Winter*, the son of the next eldest sister. That, however, depends upon the question, whether he could be properly called the heir of his mother during her life, which depends upon two rules of law; first, that to entitle a man to take as heir male by purchase, he must be heir as well as male, (and in this case, till his mother's death, *Isaac Winter* was not heir); and second,

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quod nemo est hæres viventis ; and if either of those rules must prevail in this case, *Isaac Winter's* claim is barred. The first rule has many exceptions. In most of the cases where it has prevailed, the very heir has not, as here, been *lineal* ancestor of the person claiming as heir male ; but the question has arisen among collaterals ; and the person claiming as heir male, has been *presumptive* heir male only, not heir male *apparent* ; so that another person might afterwards be born, who would answer the entire description of heir and male : and it has never prevailed, where it is plain from the instrument containing the limitation, that the presumptive heir male was intended to take. Indeed, where the limitation is so specific as to shew clearly that the first male descendant in a particular line is to take first, the second next, and so on, and the ancestor is to take nothing, it seems immaterial whether the ancestor is living or not ; and that the male descendant should take, whether his ancestor is dead, so as to make him *perfect heir*, or living, so as to make him *heir apparent* only. In *Coundon v. Clarke* (a), the leading case upon the subject, the devise was to the right heirs male of the posterity of the testator and of his name, and the brother of the testator claimed against the grand-daughters of the testator ; and in addition to the objection that he was not heir male of the body of the devisor, which was held in Lord Ossulston's case (b), to be essential, he was heir male presumptive only, for one of the grand-daughters might have had a son, who would have been right heir male. In *Ashenhurst's* case (c), the claim was by a collateral heir of the devisor, against the daughters of the devisor, and a son of either of those daughters would have been right heir male. The case put in *Shelley's* case (d), that upon a devise of a remainder to the heirs males of the body of J. S., if J. S. has issue two sons, and the eldest son having issue a daughter, dies

(a) Hob. 29. Jenk. 294.

(b) 3 Salk. 336. 11 Mod. 189.

(c) Hob. 34.

(d) 1 Rep. 103 b.

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in the life-time of *J. S.*, and then *J. S.* dies, the younger son of *J. S.* shall not take, is open to the same remark, for the younger son is heir male *presumptive* only, for the daughter of the elder son might have a son who would be right heir male. In an anonymous case in *Palmer (a)*, the devise was to executors to raise a sum of money; and then to the heirs male of the devisor; he left a brother and a daughter, and when the money was raised, the brother claimed, but his claim was disallowed, because he was not heir as well as male; and if the daughter had had a son, that son would have been heir male. So in the case put by Lord Coke (*b*), of a devise of a remainder to the heirs female of a man who has issue a son and a daughter, the daughter cannot take as heir female, because the son may have a daughter, who would be heir female of the body of the father. In *Dawes v. Ferrars (c)*, the devise was to the devisor's right heirs male for ever, and his brother's son filed a bill against his grand-daughter, for the title-deeds, and to stay waste; and a demurrer to the bill was allowed, because he was not heir male of the body of the devisor, for though he was male he was not heir, because the grand-daughter might have a son, who would be heir male: and the same point was ruled by this Court, upon a case arising upon the same will, in *Gwyn v. Hooke (d)*. Lord Ossulston's case is also an authority to the same effect; and in all these cases the *real heir* was a *collateral* of the person claiming as heir male, and not his *lineal* ancestor, and a person might have been born, who would have answered the full description of heir and male. There is another class of cases, where the rule has been held not to apply, because the instrument containing the limitation shewed a clear intention that the special heir male, the heir male *presumptive*, though not heir general, should take. In *Counden v. Clarke*, Lord Hobart said, 'It will go to the *very heir*, because no other sense appears to the

(a) Palmer, 50.

(b) Co. Litt. 24 b.

(c) 2 P. Wms. 1. Prec. Ch. 589.

(d) Vin. Abr. Devise, (W b.)

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Court," but he admitted that if a different intent did appear, that must prevail. In *Ventris*, 381, Lord *Hale* mentions this case:—A man having three daughters, gave them 2000*l.*, and devised his lands to his heir male, providing, that if his daughters troubled his heir, his gift to them should be void. He had no son, and his nephew was his heir male presumptive; and it was resolved that his nephew should have the lands, though he was not strictly heir as well as male, because the testator evidently pointed to his heir male presumptive; and his daughters' sons, who would have been strictly his heirs male, were out of his intention. In *Brown v. Barkham* (a), which was the case of a trust, the special heir male, the heir male *presumptive*, was held entitled, because that was the evident intention; and in *Wills v. Palmer* (b), the special heir male, though not heir general, was held entitled, for the same reason. In this case, the very heir is not a collateral, but the lineal ancestor of *Isaac Winter*, the claimant; the claimant is not heir male presumptive, but heir male apparent; no preferable heir can ever come into existence; and the intention of the testator is, in my opinion, plain, that the first and nearest descendant of the eldest sister should take; and for these reasons I am of opinion, that *Isaac Winter's* claim is not barred by the first of the two rules I have mentioned. Then with respect to the second rule, "*quod nemo est hæres viventis,*" if I am right in the opinion that "the first male heir" in this devise means the first according to the seniority of *Richard Chilcott's* daughters, there are many authorities which lead me to think it immaterial whether the mother is dead, so as to make the claimant perfect heir, or living, so as to make him heir apparent only. If this rule did apply here, the devise to the branch of *Richard Chilcott's* family would have failed altogether, if the testator's widow had not devised to her sister, so as to postpone the time

(a) Prec. Ch. 442, 460. Co. Litt. 24 b, n. (3).

(b) 5 Burr. 2615.

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when *Richard Chilcott's* branch was to take; because all *Richard Chilcott's* daughters were living when she died; and if her sister had died before any of *Richard Chilcott's* daughters, the same results would have followed. In *Farrington v. Derel* (a), the testator devised to the widow for life, remainder to his son *John* in tail male, remainder to his own next heir male in tail male. The testator died; *John* died without issue; the widow died; and the daughter of the testator's daughter, being his heir, entered and enfeoffed the plaintiff. The grand-daughter afterwards had a son, who entered as the testator's next heir male, and enfeoffed the defendant. The grand-daughter was still living. A special verdict was found, and the case was twice before the Court, and much debated. On the first argument, *Newton* said, that the great grandson was heir male by force of the gift, though his mother was in full life; and though that was denied on the second argument, by *Paston*, it was re-asserted by *Cotton*. The main point discussed was, whether the great-grandson was not born too late to make a valid claim, his birth not occurring till after the death of the tenant for life; *Hob.* 33, *Bro. Abr. Devise*, 5; and though no decision is reported, I think it may be taken for granted, that the mother's being in full life was not deemed a fatal objection to the son's claim; for, if it had, the case could hardly have undergone so much discussion. In *James v. Richardson*, and *Burchett v. Durdant*, which both arose upon the same will, a devise in remainder to the heirs of the body of *R. D.*, now living, and to such other heirs male or female as he should hereafter have of his body, was held to vest in *R. D.*'s eldest son, in the life-time of *R. D.*; therefore that son must have been considered as answering the description of *heir male* of his father, while his father was living: and if that son had died without issue in his father's life-time, leaving a brother, it must have been held, as a consequence of that decision, that the estate would have vested in that

(a) 9 H. 6, 23. 11 H. 6, 12.

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brother, though the father was alive. I am aware that in those cases great stress was laid upon the words *now living*, as importing that the testator considered them as heirs, though their father was living; but I think the word *heir* in this case is equivalent, and must be considered as including the heir apparent, though his mother is alive; it being quite clear that she was never intended to take, and the testator knowing that all the daughters of *Richard Chilcott* were living at the time he made his will, as the testator did in those cases. *Darbison v. Beaumont*, is another authority to the same point. There the testator devised in remainder to the heirs male of the body of his aunt, *E. L.*, wife of *R. L.*, lawfully begotten, and for default of such issue, to his own right heirs; and he gave *E. L.* a legacy, and named her three sons, so that it was plain he knew that she was living and had three sons. The eldest son brought ejectment under the will against the testator's heir: and the mother being still living, the defence was, that the son could not claim as heir male of her body. It was held by the court of Exchequer, except *Bury, B.*, after much argument and deliberation, that he might; and though that judgment was reversed by the two Chief Justices, it was affirmed unanimously in the House of Lords. The printed reasons there urged were, that the words *heirs male of the body of E. L.*, designated who the persons intended were; and that an heir apparent was sufficient heir to satisfy that designation. The last case in which this point came under consideration, was *Goodright v. White*. There the remainder was limited to the heirs male of the testator's son, and to the heirs of one of his daughters. The will mentioned both the son and the daughter as living, and the daughter being living when the particular estate ceased, the question was, whether the son could take in her life-time under the description of her heir; and the court of C. P. held that he might. *De Grey, C. J.*, observed, that 200 years ago it might have been thought not sufficient, because the description was not legally and

technically true; but that within a century a more liberal construction of the testator's words had prevailed; and he referred to *James v. Richardson*, *Long v. Beaumont*, and *Brown v. Barkham*, as authorities. Upon these authorities, as it appears to me, upon the face of this will, that the testator meant the male descendants of *Richard Chilcott* to take, according to their proximity to *Richard Chilcott*, and the seniority of their lines, without reference to the question whether their mothers were living or dead, I am of opinion that *Isaac Winter* is entitled to recover, as being the son of the eldest of his daughters who had a son, and as, therefore, his first male heir; and if I am right in this, there ought to be judgment for the lessor of the plaintiff in the ejectment brought on his demise, and for the defendant in the other ejectments.

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Judgment for the lessor of the plaintiff in the ejectment on the demise of *Catherine Viney*, and for the defendant in the other ejectments.


WALKER v. GANN.

Saturday,
February 11.

THIS was a rule for a procedendo, obtained upon an affidavit which stated—That the plaintiff commenced an action against the defendant, in the Court for the forest of *Knareborough*, for 16*l.* for which sum the defendant was arrested and held to bail; that a declaration was filed, and the defendant let judgment go by default, whereupon a writ of inquiry was executed, and a verdict found for the plaintiff; and that immediately after the finding of such verdict, a writ of certiorari was served upon the clerk of

It is a general rule, that certiorari does not lie to remove a cause from an inferior Court after judgment signed there; especially where the defendant suffered judgment by default.

Where, in an action for 16*l.* brought in the forest court of *Knareborough*, the defendant suffered judgment by default, and afterwards sued out a certiorari to remove the cause into this Court:—Held, that the certiorari was too late, and this Court made a rule for a procedendo absolute, though the defendant in opposition to that rule swore, that the jurisdiction of the inferior Court was limited to 5*l.*

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the court of the forest of *Knaresborough*, for and on behalf of the defendant.

C. Cresswell shewed cause upon an affidavit, stating, that the inferior Court had jurisdiction to the extent of 5*l.* only; and contended that the certiorari had issued regularly, and the procedendo ought not to go. This rule must have been obtained on one of two grounds: either that the Court below had jurisdiction; or that the certiorari had been served too late. With respect to the first, the statute 21 *Jac.* 1, c. 23, which takes away the certiorari in cases where the cause of action does not exceed 5*l.*, contains a proviso prohibiting the inferior Court from proceeding after certiorari sued out, except in the presence of a barrister, steward, &c., judge of the court. Now the plaintiff's affidavit does not either allege that the inferior Court had jurisdiction beyond 5*l.*, or that the judge, such as the statute requires, was present at the execution of the writ of inquiry: and as the defendant's affidavit does allege that the action was brought for 16*l.*, and that the inferior Court had jurisdiction to the extent of 5*l.* only, that objection will not serve the plaintiff. With respect to the second ground, there is no authority for saying that the certiorari was too late. In 2 *Inst.* 23, it is said, "Where judgment is given before the sheriff, and the tenant hath no goods, &c., in that county, he may have a certiorari to remove the record into the King's Bench, and there have execution, for that is not placitum." In 2 *Inst.* 602, in the answer of the judges respecting the fit time for a prohibition, it is said, "Prohibitions by law, are to be granted at any time, to restrain a Court to intermeddle with, or execute any thing which, by law, they ought not to hold a plea of":—"for their proceedings, in such case, are coram non judice." The same doctrine seems applicable to the writ of certiorari, where the proceedings below are coram non judice; and the plaintiff has not shown that his proceedings were coram judice, which he was bound to do. In *Rer v.*

Morley (a), it was held that certiorari lay to remove the orders of justices under the conventicle act, 22 *Car.* 2, c. 1, even after appeal, trial, verdict, and judgment; which was going much further than the Court are asked to go in the present case.

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Dundas, contra, relied upon the second objection. The return to the certiorari, (the truth of which cannot now be questioned, *Hawk.* B. 2, c. 27, s. 69;— *v. Cowper* (b), and *Rex v. Jackson* (c), shews that judgment was signed before the certiorari was served: the service, therefore, was too late. Mr. *Tidd* lays it down as a general rule, that, after judgment, a certiorari does not lie to remove a cause from an inferior Court (d); and he goes on to state the only exceptions to that general rule, none of which are at all applicable to the present case. The same rule is laid down in *Lilly's Pr. Reg.* I. 144. D.; and, indeed, in all the books of practice, and has been recognised in various cases; *Rex v. North* (e), *Rex v. Seton* (f). Upon this short ground, therefore, the plaintiff is entitled to a procedendo.

BAYLEY, J. (g)—I am clearly of opinion that the writ of certiorari issued in this case, was served too late, and therefore that the writ of procedendo prayed for, ought to go. It is contended now that the inferior Court has no jurisdiction beyond 5*l.*, and, therefore, that this being an action for 16*l.*, is removeable, notwithstanding the statute 21 *Jac.* 1. The defendant certainly does *now* produce an affidavit of this fact, but he is too late in so doing; because if the want of jurisdiction was the ground of the certiorari, he should have satisfied us that he laid that ground fully and openly before the Court, at the time when he moved for the writ: for, otherwise, the certiorari is rendered an engine of oppression upon the other party, which it was the object of

(a) 2 Burr. 1040

(b) 6 Mod. 90.

(c) 6 T. R. 145.

(d) Tidd. 396, 6th ed.

(e) 1 Salk. 144.

(f) 7 T. R. 373.

(g) *Abbott*, C. J., was absent.

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the statute to prevent. *Rex v. Morley* (a), therefore, does not affect the present case; because in that case, there clearly must have been an affidavit of the want of jurisdiction in the first instance, which there does not appear to have been here. The general rule is, that after judgment, certiorari does not lie; and as this case has not been brought within any of the exceptions to that rule, it falls within the operation of the rule itself, and therefore we are bound to grant a procedendo.

HOLROYD, J.—I am of the same opinion. I think it is a sound and wholesome general rule, that a cause shall not be removed from an inferior jurisdiction, after judgment has been signed there; and I think the rule is particularly applicable where the defendant suffers judgment to go by default in the first instance, and then applies for a certiorari: for such conduct is clearly oppressive, and within the mischief intended to be remedied by the statute.

Rule absolute.

(a) 2 Burr. 1040.

Friday,
10th February.

MOSS v. HEAVYSIDE.

A clerk in a mercantile house, described in the notice of justification by the addition of "gentleman," rejected as bail.

ONE of the bail in this case was described in the notice of justification by the addition of "gentleman;" and on his opposition, he admitted that he was only a clerk to a warehouseman, with a salary of 150*l.* a year; but was a housekeeper, and swore to property sufficient to justify; but,

LITTLEDALE, J., thought that the misdescription of the bail in the notice was a ground of rejection; and he was

Rejected accordingly.

C. Cresswell, for the plaintiff; Chitty, for the defendant.

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Saturday,
11th February.

METCALFE v. EARL STRATHMORE.

ON shewing cause against a rule nisi for setting aside the warrant of attorney given for securing the payment of an annuity, and the judgment entered up thereon, the objection was, that the memorial did not contain the christian names of one of the subscribing witnesses to the warrant of attorney, set out at full length, pursuant to 53 Geo. 3, c. 141, s. 2; the signature of the witness in question being "*James W. Cresswell*."

Where the memorial of an annuity deed described one of the subscribing witnesses to the warrant of attorney by the initials of his christian name only:—
Held a ground for setting aside the warrant of attorney and judgment thereon.

After hearing *Scarlett* and *Tindal* for the plaintiff; *Copley*, A. G., and *Gurney*, for the defendant, being stopped,

THE COURT (*a*) said, they would not enter into the validity of the annuity deed itself; but, on the authority of *Cheek v. Jefferies* (*b*), and *Doe v. Bromley* (*c*), they thought the objection to the memorial fatal, and therefore made the rule absolute for setting aside the warrant of attorney, and judgment thereon.

Rule absolute (*d*).

(*a*) LITLEDAL, J., absent.

(*b*) Ante, vol. iii., 385. 2 B. & C. 1.

(*c*) Ante, vol. vi., 292.

(*d*) See *Smith v. Pritchard*. Ante, vol. i., 374. 5 B & A. 717, & *Const v. Phillips*. Ante, vol. iv., 344.

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Monday,
13th February.

Where an arbitrator who had made his award in the plaintiff's favour, was supposed to have made a mistake in calculating the sum which the plaintiff claimed a right to recover:—

Held, that the Court could not refer it back to the arbitrator to correct the mistake, without the consent of the defendant.

Ex parte CUERTON.

IN this case certain accounts had been referred to a barrister, for arbitration. The arbitrator made his award in the plaintiff's favour, but in calculating the sum claimed to be due, he made a mistake in the amount of the sum which the plaintiff was supposed to be entitled to recover.

F. Pollock, on a former day, obtained a rule nisi to refer it back to the same arbitrator to report to the Court whether he had not made a mistake in his calculation, in order that, if so, his award might be amended.

Chitty now opposed the rule, on the ground that the Court had no authority to refer the case back after the arbitrator had made his award.

THE COURT said, they had no authority to refer it back without the consent of the parties.'

Chitty said, he was not instructed to consent; whereupon

THE COURT said, they could not interfere, and the

Rule was discharged.


Monday,
13th February.

WEBSTER v. JONES, Esq.

In an action against the marshal for an escape, he is entitled to a particular of the cause of action for which the plaintiff sues.

THIS was an action against the marshal of the King's Bench for an escape. The defendant had moved for a particular of the escape for which the action was brought, and the plaintiff delivered one, stating that it took place


between the 13th of *May*, and the 1st of *November*, 1823. The defendant then obtained a Judge's order for a better particular, which

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John Evans now moved to discharge. The plaintiff cannot furnish a better particular of the escape for which he sues than that already delivered. His witnesses are the prisoner and his attorney, who are adverse to the plaintiff; and the latter swears that he has applied to the attorney to specify the time of the escape, which he refuses to do. But if these facts were not sworn to, the practice of requiring particulars in such a case as this, is opposed to the rules of pleading, and inconsistent with decisions. It is clear that the day on which an escape is alleged to have taken place, by a wise and excellent rule of pleading, is wholly immaterial; and to place the plaintiff under the necessity of specifying the time, would be to act in opposition to this rule, and would be a great hardship. If the witnesses were not adverse, as in this case, they might not be able to swear to the precise day of the escape, yet the plaintiff might still have a good cause of action. But, in point of law, the marshal has no right to this particular. He is bound to know the state of his own prison, and when escapes have taken place. If he should wish to plead a return, he must set forth in his plea all the escapes and returns which have taken place, otherwise he does not answer the declaration; and if the plaintiff proves an escape, not pleaded to, subsequent to the first escape, he will be entitled to a verdict. *Griffin v. Eyles* (a). *Chambers v. Jones* (b). These decisions not only shew that the marshal has no right to the particular, but also that the convenience supposed to arise from the particular, in shortening the pleadings, does not exist; for, if the plaintiff specify in his particular the first escape suffered, the defendant cannot answer this escape sufficiently, without setting forth all the subsequent escapes

(a) 1 Bos. & Pul. 413.

(b) 11 East, 406.

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and returns in his plea. [*Holroyd, J.*—How can the marshal swear to the return, if he does not know for what escape you sue?] He may swear, that if any escape took place, he knew nothing of it. *Wear v. Eyles (a)*. The stat. 8 and 9 Wm. 3, c. 26, was not meant to protect the marshal in any case where there had been a voluntary escape, but if he is entitled to a particular, he will be protected contrary to the intent of that statute. Suppose the marshal voluntarily suffered the prisoner to escape on the 1st *June*, and that the plaintiff specifies in his particular an escape on the 5th, the marshal may perhaps safely swear, that the escape on the 5th was negligent, while in point of fact there was a voluntary escape upon the first, for which the marshal was liable. In such a case, if the time in the declaration had remained indefinite, the marshal could not have sworn in the language of the usual affidavit, “that if any such escape took place, it was without his knowledge.” By obtaining the particular, therefore, the marshal is unjustly favoured, and has the advantage of the statute in a case where it was not meant to protect him. In this case the marshal is indemnified, and for these reasons the judge’s order for a better particular should be discharged.

ABBOTT, C. J.—You are not required to state the precise day of the escape, for which you sue. The first principle of justice is, that a defendant should be informed what he is charged with, and therefore I think that the order should stand, as these particulars are not sufficiently explicit.

HOLROYD, J. (*b*)—You can give the defendant some notion of the transaction on which your action is founded.

LITLEDAL, J., concurred.

Rule refused.

(*a*) 2 Sir W. Bl. 1057.

(*b*) *Bayley, J.*, was absent.

The KING v. WILLIAM DOWNES (a).

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QUO WARRANTO information against the defendant for usurping the office of a free burgess of the borough of *Colchester*, in the county of *Essex*. Plea, that his late majesty, by a charter in the 58th year of his reign, at the humble petition of the burgesses of *Colchester*, did will, grant, ordain, constitute, and declare, that the said borough of *Colchester*, might, and should be, and remain for ever thereafter a free borough of itself, terminated by all its ancient metes and bounds, and that the men *free burgesses* of the same borough, by whatsoever name or names of incorporation they had theretofore been incorporated and called, should and might be for ever thereafter one body politic and corporate in deed and in name, by the name of the mayor and commonalty of the borough of *Colchester*, in the county of *Essex*. And his said majesty, by the said charter, declared that for ever thereafter there should and might be, within the said borough, to be nominated and chosen out of the free burgesses of that borough, in manner after mentioned, one who should be called the mayor, eleven others who should be called the aldermen, eighteen others who should be called the assistants, and eighteen others who should be called the common councilmen of the borough; and which said mayor should likewise be an alderman of the borough; that every common councilman to be chosen in manner thereafter expressed, should take his corporal oath, before the mayor and two aldermen, faithfully to execute the office. The plea then set out part of the charter, nominating the first mayor, eleven aldermen, eighteen assistants, and eighteen common councilmen, of whom the defendant was one, and averred that the charter was accepted, and that afterwards, and before defendant took upon himself the office of common councilman, he took the oath prescribed by the charter, and then took upon himself the

The nomination of a corporate officer in a modern charter, by necessary intendment makes him a *free burgess* of the borough, if he were not so before.

(a) See *Rex v. H. Perkins*. Ante vol. iv. 427.

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said office, by reason of which said several premises, the said defendant then and there became and was, and from thence hitherto hath been and still is, a free burgess of the said borough. Demurrer to this plea, and joinder in demurrer.

Jessopp, in support of the demurrer. The question intended to be raised on these pleadings, is, whether a person not being previously a free burgess of *Colchester*, but nominated by the crown in this modern charter, as one of the eighteen common councilmen of the borough, is thereby clothed, ipso facto, with all the privileges of a free burgess. On the part of the relator, it is submitted, that such a consequence by no means flows from such premises. The charter set out in the plea, begins by incorporating the men "*free burgesses*" of the said borough, and declares that the men *free burgesses* shall be for ever *thereafter* one body politic and corporate, in deed and in name, by the name of, &c. This must mean such persons as were free burgesses at the date of the letters patent, and not persons who were then foreigners. In construing this charter nothing can be taken by way of intendment or inference, so as to give effect to the proposition which will be contended for on the other side. Nothing but express words can confer the privileges which this defendant claims a right to exercise. The mere nomination of the defendant as a common councilman will not effect that object, unless there is something shewn which unequivocally establishes that such was the intention of the crown. It is to be observed that in the defendant's plea there is no averment of the identity of the two offices of burgess and common councilman. Now there is no doubt of the distinctness and severalty of these offices; and it does not necessarily follow that because a man may be a common councilman under this charter, he is therefore a free burgess. Each may be claimed and exercised under a totally different title, and the rights and privileges of each are not incidental to the

other. The common councilmen are to be "counselling, aiding, and assisting to the mayor, in all causes, matters, and business, touching or in anywise concerning the borough." Now all this may be done by a common councilman, without reference to his character of free burgess, which solely regards certain privileges independently of his office of common councilman. The privileges of a free burgess are prescriptive, and are acquired not by force of the charter, but by the ancient usages and customs of the borough. At the time this charter was accepted it could not have been in the contemplation of the commonalty at large, that the same prescriptive privileges which they enjoyed should be equally conferred upon the new common councilmen merely by force of their nomination to that office. A common councilman has duties to discharge quite distinct from his office of a free burgess, which is invested with valuable rights and privileges independently of the charter in question. It is quite clear that before this charter was tendered to the corporation, no stranger could be allowed by any implication or inference to exercise the rights and privileges of a free burgess. This defendant, at the time of his nomination as a common councilman, was a foreigner, and as there is no express declaration in the charter that he should by force of such nomination be entitled to the privileges of a free burgess, it cannot be held that he is so entitled by inference and intendment, because that would be violating all the rules by which charters are expounded. The charter contemplates the removal or resignation of the nominated common councilman. Suppose, then, some of these common council to be removed by reason of poverty, misconduct, or other cause, could it be successfully contended that, notwithstanding such removal, still they would be entitled to exercise all the privileges of a free burgess? Surely not; and yet the argument on the other side must be carried to that extent. This view of the subject shews that it could not have been in the contem-

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plation of the crown, even if it had the power, to confer *prescriptive* privileges upon persons who were previously strangers to the corporation. But it is denied that the crown has power to *create* free burgesses of this corporation, and confer upon mere strangers those rights and privileges which can only be acquired by the customs and usages of the borough. Assuming, however, that the crown has such a power, still the creation and the grant must be expressed in clear and unambiguous terms. Here there is no express declaration that these common-councilmen shall have by virtue of their office all the privileges, rights, and immunities which are incident to the prescriptive office of free burgess, and as inference and intendment cannot be brought in aid of this defendant, without violating the inflexible rules of construction on such subjects, it is submitted that judgment must be given for the crown.

Chitly contra, was stopped by the Court.

ABBOTT, C. J.—I am of opinion that the defendant's plea shews a good title in him to be a free burgess of this borough. It appears by the plea, that his late majesty, at the humble petition of the burgesses of the borough of *Colchester*, on behalf of themselves and the other burgesses there, ordained and declared that the borough of *Colchester* should be and remain for ever thereafter a free borough of itself, governable by all its ancient forms, and that the *men free burgesses* of the said borough, by whatever name of incorporation they bore, whether before incorporated or not, should for ever thereafter be one body corporate and politic in deed and in name." The corporation, therefore, is to be a corporation of "men free burgesses of the borough." It then proceeds to state that his majesty by his said letters patent declared that there should and might be within the borough for ever thereafter, to be nominated and chosen *out of the free burgesses*, in the manner thereafter expressed, one who should be called

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the mayor, eleven others who should be called the aldermen, eighteen others who should be called the assistants, and eighteen others who should be called the common council of the borough. That his Majesty then declared, that if any of the assistants appointed by these presents, or thereafter to be chosen by virtue of the same, should die, be removed from, or resign his office, it should be lawful for *the free burgesses of the commonalty*" (and here the charter distinguishes the *free burgesses* from *the commonalty*) "of the borough for the time being, (except as therein after excepted) or the major part of them, to choose and prefer one of the eighteen common-councilmen, for the time being, into the place of an assistant, in the room and stead of such assistant so dead, removed, or having resigned, to supply the number of eighteen assistants, and so, from time to time, as often as the case should so happen, for ever." Nothing, in my opinion, can more strongly intimate in those parts of the charter which I have thus read, his Majesty's declared intention, that at least in all future times, every *future* common councilman should be a free burgess of the borough. The charter then proceeds to appoint the first mayor by name, the first eleven persons to be aldermen, the first eighteen assistants, and the first eighteen common council, of which the defendant was one. The defendant then proceeds to allege, that he had taken the oath of office, as a common councilman of the borough; and by virtue thereof, and by the charter, he became entitled to the privileges of a free burgess. Unless, therefore, we should hold, that his Majesty, by appointing this defendant to an office, which it is his declared intention that none but a free burgess shall fill hereafter, has virtually appointed this person to be a free burgess; this anomaly will arise, that there may be officers of the corporation of a higher class, who are not free burgesses; and if those who die, or are removed, are to have their places supplied by free burgesses, the result must be, that the remainder of those who were

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originally nominated, will be on an equal footing with the new officers, as free burgesses. This observation applies not only to the eighteen common councilmen, but to the eleven aldermen, and the eighteen assistants, who are, in the first instance, named as the superior officers and heads of the corporation. It seems to me that, construing this charter according to sound reason and principle, we are bound to hold that his Majesty, by naming this defendant to an office, which it is his declared intention none but a free burgess shall hereafter fill, has virtually, and by necessary intendment, made him a free burgess.

BAYLEY, J.—I am of the same opinion; the charter of the 58 Geo. III. ordains that the new *free burgesses* are to be a corporation for ever *thereafter*; and then it nominates the first new mayor, the first eleven new aldermen, the first eighteen new assistants, and the first eighteen new common councilmen. Then does not the charter make every one of these persons a free burgess, if he was not so before? It seems to me, that if the charter is not to have this construction, there will be this absurdity with respect to the qualification of the aldermen, assistants, and common councilmen, respectively, that those who have been nominated by the crown, will stand upon one footing, and the new ones chosen, as death or a motion may happen, on a totally different footing, which would be extremely anomalous. I am of opinion, that this defendant having been nominated by the crown as a common councilman, became, ipso facto, a free burgess.

HOLROYD, J.—This appears to me to be a very clear case, and I concur in the reasons given by the Court for giving judgment for the defendant.

LITLEDALE, J., concurred.

Judgment for the defendant.

FOXALL'S Bail.

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ON the opposition to the bail in this case, one of them admitted that he was to receive five per cent from the defendant's attorney, on the amount of the sum for which he was to justify.

Bail rejected where he was to receive a commission on the amount for which he proposed to justify.

HOLROYD, J., who presided in the bail court, immediately ordered the bail to be rejected.

Rejected (a).

Barstow for the plaintiff, and *Hutchinson* for the defendant.

(a) See *Ward v. Levi*, and *Crum. v. Kitchin*. Ante, vol. ii. 421.

R. HEWLINS v. F. SHIPPAM.

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CASE for obstructing a drain. The first count of the declaration stated, that one *W. Humphrey*, and one *E. Humphrey*, being seised in fee of a certain messuage or inn, and yard thereto adjoining, with the appurtenances, situate at *Chichester*, demised the same to the plaintiff by indenture, for a certain term of years, and by virtue thereof plaintiff entered; and that one *J. Shippam*, and *J. Sayer*, being possessed of a certain other yard with the appurtenances, adjoining plaintiff's premises, as tenants to one *R. Wills*, who had the reversion thereof, the said *J. Shippam*, and *J. Sayer*, did give and grant, and said *R. Wills* did give, grant, and confirm, unto said *W. and E. Humphrey*, their heirs and assigns, license and authority to make and con-

In case for obstructing a drain, plaintiff claimed right and title to the drain by virtue of a license granted to his landlords, their heirs and assigns, to make the drain and have the foul water pass from their scullery through the drain across the defendant's yard into another

yard appurtenant to the premises in plaintiff's occupation:—Held, that the interest, as declared upon by plaintiff being in its nature *freehold*, and the license to support it, being merely by *parol* and not by *deed*, the action was not maintainable.

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struct at the proper costs and charges of said *W. and E. Humphrey*, a certain gutter or drain, from and out of the said messuage or inn, into and upon, over, across, and out of a certain part of the said yard of said *J. Shippam* and *J. Sayer*, unto and into the said yard of said plaintiff; and that said *W. and E. H.*, their heirs and assigns, and their farmers and tenants from time to time, at all times in future, occupiers of the said messuage or inn and yard, with said appurtenances, should have the foul water, from time to time collected, and being in a certain part, to wit, the scullery of the said messuage or inn, at all times to drain, run, and flow from and out of the same, through and along the said gutter or drain, into, upon, over, across, and out of the said part of the said yard of said *J. Shippam* and *J. Sayer*, unto and into said yard of said plaintiff, for so long time as need and occasion should require, for the convenient occupation of the said messuage or inn, with the appurtenances. Averment, that said *W. and E. Humphrey*, confiding in the said license and authority of said *J. Shippam*, and *J. Sayer*, and *R. Wills*, did duly make, and construct at their own proper costs and charges, such gutter or drain as aforesaid, according to the true intent and meaning of said license and authority, and necessarily expend a large sum of money in and about the making and constructing of the said gutter or drain, of which said premises defendant had notice. Breach, that defendant contriving to injure plaintiff, and to deprive him of all the benefit and advantage of said gutter or drain, and to harass and annoy plaintiff in the convenient occupation of said messuage or inn, afterwards, and after the making of the said gutter or drain, and whilst plaintiff was so possessed, the said *J. Shippam*, and said *J. Sayer*, or said *R. Wills*, or said defendant, not having given any notice to said *W. and E. Humphrey*, or said plaintiff, or either of them, or then or at any other time made or offered them any compensation in that behalf, or countermanded or revoked the said license and authority), wrongfully and

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injuriously, without the license or consent of said *W.* and *E. Humphrey*, or said plaintiff or either of them, and against their will, constructed and made, a certain stoppage or dam with bricks and mortar, in, upon, and across a certain part of the said gutter or drain, being in and upon the said part of the said yard, formerly of said *J. Shippam* and *J. Sayer* as aforesaid, and thereby wholly dammed up and obstructed the said gutter or drain, and so kept and continued the same for a long space of time, to wit, &c., by means of which said premises, divers large quantities of foul water from time to time during the time last aforesaid, collected, and being in the said scullery of the said messuage or inn, and which ought of right for the convenient occupation of said messuage or inn, by said plaintiff, to have run and flowed; and which but for the said grievance so committed by defendant, would on the occasion aforesaid, have run and flowed, &c., became and were, during all that time penned and forced back upon and into the said messuage or inn of said plaintiff, and the said scullery thereof, and overflowed, and greatly damaged the same, and rendered the same noisome, offensive and unwholesome, and greatly deteriorated and lessened in value to said plaintiff. Second count, the same as the first, only averring the yard through which the drain was carried, to be in possession of the defendant as tenant to *R. Wills* and that the defendant gave and granted, and that *R. Wills* gave, granted, and confirmed the license and authority mentioned in the first count. Third count averred, the demise of the plaintiff's messuage, or inn and yard, to have been by *W. E.* and *Thomas Humphrey*, and that the license and authority declared upon was given by the defendant alone, which license and authority was to endure so long as defendant should continue in the occupation of the premises demised to him by *R. Wills*. Fourth count, that *J. Shippam* and *J. Sayer*, being possessed of a messuage and yard, with the appurtenances, as tenant to *R. Wills*, in whom was the reversion thereof, and being so


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possessed, "it was agreed by and between the said *W.* and *E. Humphrey* of the one part, and said *R. Wills* and said *J. Shippam*, and *J. Sayer*, of the other part; that said *W.* and *E. Humphrey*, should at their own costs and charges, do and perform certain repairs and improvements in and about the said last mentioned premises of said *J. Shippam* and *J. Sayer*, that is to say, that *W.* and *E. H.*, should raise certain chimnies, belonging to the same premises, should complete one side of the said last mentioned messuage, should take down the old ash-hole on said premises, and erect a new ash-hole thereon, and should have a certain passage leading to the said ash-hole; in consideration of which said several matters and things, to be so done and performed by said *W.* and *E. H.*, said *J. Shippam* and *J. Sayer*, did then and there give and grant and said *R. W.* did give, grant, and confirm unto said *W.* and *E. H.*, their heirs and assigns, a certain licence and authority," &c., (same licence and authority as stated in the first count). Averment that said *W.* and *E. H.*, confiding in said last mentioned agreement and licence and authority, performed their part of the agreement, &c.; and that defendant had notice thereof. Breach, the same as that assigned in the first count. Fifth count, same as the fourth, only averring defendant's possession of the premises, and that the agreement to do the repairs, &c., therein mentioned as the consideration of the license to make the drain, was entered into, by and between *W.* and *E. Humphrey*, and the defendant. Sixth and seventh counts, more general. Plea, the general issue, not guilty. At the trial before *Graham, B.*, at the last Spring Assizes, for the county of *Sussex*; the material facts of the case were these:—The plaintiff was tenant and occupier of the *Swan Inn*, in the city of *Chichester*, under a lease for years, granted by Messrs. *W. E.* and *T. Humphrey*, brewers of the same city, to whom the house belonged; and the defendant was a linen draper, occupying a house and premises

next adjoining to the plaintiff's. In *April*, 1819, Messrs. *Humphrey* pulled down the *Swan* Inn for the purpose of re-building it; and in *July* in the same year, Mr. *Wills*, defendant's landlord, was applied to for permission to have a drain run through defendant's yard, from the *Swan* Inn, into a yard belonging to the latter building. Mr. *Wills* replied, that he had no objection, if the defendant had not. Application was then made to the defendant, who replied that drains were very offensive things, and he never knew any that was not a nuisance. Being assured, however, that the mode in which the proposed drain was intended to be constructed, would prevent its becoming a nuisance, he said, he had no objection, but stated that if the drain turned out to be a nuisance he should stop it up. This consent was given by parol, and no time was stated during which the drain was to continue. At the time this consent was given, Messrs. *Humphrey* agreed to repair that part of the premises which adjoined the *Swan*, (the ash-hole, mentioned in the pleadings), and which had been injured by pulling down the old house, raise the defendant's chimnies, which it became necessary to do, from the increased height of the new *Swan* Inn, and re-pave the yard through which the drain was to run. Under these circumstances, the drain was constructed, and Messrs. *Humphrey* incurred an expense of about 100*l.*, in repairing the defendant's premises, raising his chimnies, and repairing the yard. The drain was let into the soil of the yard, paved at bottom, built at the sides with bricks and mortar, and covered with flag stones. The drain having become a nuisance, the defendant, without any formal notice, stopped it up on the 30th *April*, 1823; whereupon the plaintiff brought this action. At the trial, the principal question was, whether the license under which the drain was constructed, passed to the plaintiff such an interest in the land as required it to be put into writing, within the meaning of the first section of the Statute of Frauds, or whether it was only such an interest as might

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be determined without notice. The learned Judge was of opinion, that the case came within the intent and meaning of the Statute of Frauds, holding that the plaintiff had at least such an uncertain interest in the land, as required the agreement to be put into writing, and the license being only by parol, it constituted a mere tenancy at will, which might be determined without a formal notice (*a*); and on this ground he directed a nonsuit, but gave the plaintiff leave to move to enter a verdict for nominal damages.

In *Easter* term last, *Taddy*, Serjeant, moved accordingly and obtained a rule nisi, on two grounds; first, that this was not an interest in land within the words of the Statute of Frauds, but merely an easement; and second, that whatever it might be considered to be, still it could not be determined without some notice. In support of his motion, he cited *Webb v. Paternoster* (*b*), *Wood v. Lake* (*c*), *Godley v. Frith* (*d*), and *Winter v. Brockwell* (*e*).

Marryat, (with whom was *Platt*), shewed cause. By the licence in question the plaintiff acquired, at least, an uncertain interest in land, and the license not being put in writing and signed by the parties creating the same, has the effect only of an estate at will, and might be determined without any notice whatever (*f*). It is clear here that no writing passed between the parties, and it is equally clear that the plaintiff acquired some interest in the freehold; and, if not in perpetuity, at least, for so long a time as the defendant continued in the occupation of the premises.

(*a*) Two other points were made at the trial, first that the license being granted personally to Messrs. *Humphrey*, was not an interest which they could assign or grant to others, and therefore the action being brought in the name of their lessee could not be supported, inasmuch as the drain was not an easement appurtenant to the premises; and second, that as the drain turned out to be a nuisance, the defendant had a right to abate the same and stop up the drain at all events.

(*b*) *Palmer*, 71.

(*c*) *Say*, 3.

(*d*) *Yelv.* 159.

(*e*) 8 *East* 308. See *Selw. N. P.* 804. 3 *Stark. N. P. c.* 61.

(*f*) 29 *Car.* 2, c. 3, s. 1.

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[*Bayley J.* The question is, whether, the plaintiff acquired any interest whatever in the soil]. He certainly had an interest for an indefinite time, which is one of the cases mentioned in the Statute of Frauds. The cases of *Webb v. Paternoster*, and *Godley v. Frith*, are not in point, because both were decided, at least, half a century before the Statute of Frauds. [*Bayley, J.* The object of citing those cases was to shew that this was not an interest in land, but only an easement]. From the very nature of this drain no doubt can be entertained that it conveyed some interest in the soil. It was cut into the ground, paved at the bottom, staunched at the sides, and covered over at the top so as to constitute a plain, unequivocal, and distinct appropriation to the plaintiff of so much of the defendant's soil. The plaintiff had acquired an exclusive right to use the drain, and it is clear that so long as the licence continued neither the defendant nor his landlord could interfere with it. For instance, neither the defendant nor the owner of the inheritance, could have built a wall on the spot; and, therefore, it must be considered as a complete dereliction on the part of the defendant of so much of his own soil to the exclusive use of the plaintiff. The question then is, whether a man, notwithstanding the Statute of Frauds can acquire an interest in the soil of another, the interest being created for an uncertain term. [*Holroyd, J.* The question is, whether the right to use the drain does convey an interest in the soil itself]. It is impossible to enjoy the right without having some interest in the soil. This is not like the case of a wayleave where there is no exclusive appropriation of the land itself; because here the defendant could do no act incompatible with the plaintiff's rights. This is not a mere easement over the surface of the land, which may be enjoyed in common with the defendant himself; but it is an exclusive appropriation of so much of the land to the plaintiff. It is one of the incidents of such an appropriation, that the plaintiff has at all times a right of drainage, and it follows as a conse-

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quence of such right, that the party in whom it is vested may go over the land of his neighbour at all times for the purposes of reparation. If this cannot be denied, then this case comes clearly within the words and the mischief of the Statute of Frauds. This case is clearly distinguishable from a right of way or other similar easement, because in the latter no interest in the soil passes. But, even in the case of an easement, if any interest, however slight, in the soil should pass, it may be doubted whether it would not come within the operation of the statute. It is admitted that if the plaintiff had not the exclusive enjoyment of the soil through which the drain ran, then it would not come within the operation of the statute; but the fact being otherwise, it is decisive of the question. The cases already adverted to having been decided before the statute, do not apply, and it will be found upon examination that those decided since, and relied upon by the plaintiff, are equally inapplicable. The case of *Wood v. Lake* (a), is an authority against the plaintiff, because there the party was to have for seven years, the sole use of that part of the land upon which he was to stack his fuel. That was in effect a demise for seven years of the soil in question, and consequently it would clearly come within the words of the statute. But it may be doubted whether that case is correctly reported. The case of *Winter v. Brockwell* is manifestly distinguishable from this. That was an action for a nuisance in putting up a skylight, but there the skylight was put up on the defendant's own soil. The cases cited on the other side are therefore inapplicable. On the other hand, the case of *Fentiman v. Smith* (b), is directly in point with the present. In that case, the plaintiff complained of an obstruction of a water course, and declared upon his possession of a mill with the appurtenances, and that by reason of such his possession he had a right to the use of the water running in a certain kennel to the mill. To prove this allegation evi-

(a) Say. 3.

(b) 4 East, 107.

dence was given that the tunnel was made on the defendant's land, which he had agreed to let the plaintiff have for a certain consideration, but of which no conveyance was made by him to the plaintiff in writing, and as he had since refused his assent, the Court held that the allegation was not made out, because the plaintiff had not the water by reason of his possession of the mill, but merely by a parol contract, which could not pass the title to the land, and consequently as a license, it was revocable. In giving judgment, Lord *Ellenborough* there said, the title to have the water flowing in the tunnel over the defendant's land could not pass by parol license without deed, and the plaintiff could not be entitled to it, as stated in the declaration, by reason of his *possession* of the mill; but he had it by the license of the defendant, or by contract with him, and if by license it was revocable at any time. The case of *Rex v. The Mayor of Bath* (a), is in principle also applicable to the present, because there the Court held, that the defendants were rateable as occupiers of land by reason of their water pipes, which were laid in the soil of the parish in which they were held rateable. In this case, therefore, the plaintiff must be considered as having such an uncertain interest in land, as to bring the case within the operation of the Statute of Frauds, and consequently the learned Judge properly directed a nonsuit.

Taddy, Serjt. (with whom was *Long*), contra. It is submitted, first, that this is not such an interest in land as will bring the case either within the words or the mischief of the Statute of Frauds, inasmuch as it is a mere easement or license; and second, that whatever it is to be considered, still, as a beneficial agreement for something, it could not be put an end to, without some notice, and not left to the will and pleasure of the defendant. The Statute of Frauds does not absolutely make void interests of

(a) 14 East, 609.

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this description which are not in writing, but merely declares that they shall have the force and effect of leases or estates at will only. It therefore, impliedly, admits that an interest in land may be created by parol. But it is denied that the agreement between these parties conveyed any interest whatever in the land itself. All that it amounted to was, a mere license or easement, giving to the plaintiff the right to have the drain water flow through the defendant's yard. Admitting that so long as the license continued, the defendant or his landlord could not build a wall or erect any obstruction on the spot in question, still that does not affect the question, because such an argument would be equally applicable to the ordinary case of a right of way, inasmuch as the owner of the soil could not build so as to obstruct the passage. [*Bayley, J.* Would the plaintiffs have had a right to go upon the land, from time to time, for the purpose of repairing the drain?] That might be, and still the right to do so would not be inconsistent with this being merely an easement. In *Gerrard v. Cooke (a)*, it is said, by *Heath J.*, that "at common law the right to repair is incident to the grant of a way." Admitting that the plaintiff here had a right to go upon the land to repair the drain, it makes rather in favour of than against the argument. Such a right would be incident to the easement, and not referable to any supposed interest in the land. The case of *Godley v. Frith (b)*, is a direct authority to shew that this is an easement, and not an interest in land: There the plaintiff declared for a disturbance in a way, and averred that he was seised of a messuage, and that he and his ancestors had had a way from his messuage to such a place for them, their servants, &c. and upon not guilty, the jury found the way as the plaintiff had declared, but found it to be appurtenant to the messuage; and the Court said, that the verdict had found nothing against the plaintiff, but that he shall recover, "for the plaintiff, in his declaration shall never

(a) 2 N. R. 115.

(b) Yelv. 159.

lay the way to be appendant or appurtenant, because it is only an *ease* and not an *interest*; it is otherwise of a common, for that is an interest, and may be of several natures, appurtenant, appendant, or in gross: but a way cannot be so." So here, the plaintiff acquires no interest in the land. All he has by the license, is the privilege of having the foul water pass from his scullery through the defendant's land, which is simply an easement without any interest. From the very nature of the right, it is no more than an easement, for it may be fully enjoyed without any interest whatever in the soil. The case of *Webb v. Paternoster* (a), is also an authority in point. There it was held, that a grant of a license to the plaintiff to stack hay upon land for a convenient time till he could sell it, did not amount to a lease of the land, the agreement being merely for an easement and not for an interest in the land. It is said that this, and the preceding case, were decided long prior to the Statute of Frauds; but these cases are not cited for the purpose of interpreting that statute, but merely to shew the nature of the subject in question. The words "any uncertain interest," as used in the Statute of Frauds, do not apply to the case of a mere easement. Those words are obviously used in contradistinction to an easement. The case of *Wood v. Lake* (b), is likewise in point. It is said, that that case is not correctly reported in *Sayer*, but it is cited and approved of by *Gibbs, C. J.*, in *Taylor v. Waters* (c), and is a direct authority to shew that a liberty to stack coals upon part of a close for seven years, and during that time to have the sole use of that part of the close for such purpose, gives no interest in land, and is good for seven years, notwithstanding the Statute of Frauds. The case of *Taylor v. Waters*, which respected the right to an opera ticket, is not of itself an authority in point upon this branch of the argument; but the principle there laid down by *Gibbs, C. J.*, is strictly applicable to the present case, for that

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(a) *Palmer*, 71.(b) *Say*, 3.(c) 7 *Trunt.* 384. 2 *Marsh.* 551.

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learned judge, after referring to *Webb v. Paternoster*, *Wood v. Lake*, and other cases, says, "These cases abundantly prove, that a license to enjoy a beneficial privilege in land may be granted without deed, and, notwithstanding the Statute of Frauds, without writing." Then, secondly, whether this be an interest in land or not, still as there was a beneficial agreement between the parties, it is perfectly clear that it could not be determined without notice. For this, the cases of *Winter v. Brockwell* (a), and *Taylor v. Waters*, are authorities. The first of these cases shews that where there has been a beneficial agreement between the parties, and one has expended his money in execution of it, it cannot be recalled without reasonable notice. The case of *Fentiman v. Smith*, is inapplicable, because there, the plaintiff claimed the water-course as appurtenant to the mill, whereas he had it by license of the defendants, upon a contract made with him, and on that ground the case was decided. For these reasons; first, that this was merely an easement, and not an interest in land, it need not have been granted in writing; and second, as it was a beneficial agreement for an easement, it could not be determined without some sort of notice.

This case was argued at the sittings after last *Michaelmas* term, before *Bayley*, *Holroyd*, and *Littledale*, Js., and time having been taken to advise on the case, judgment was now delivered by

BAYLEY, J.—This was an application to set aside a nonsuit. The action was for stopping up a drain leading from the plaintiff's premises through the defendant's yard. The ground of the nonsuit was, that the right to have the drain pass through the defendant's yard, was an interest in the defendant's land, which under the first section of the Statute of Frauds, there being nothing in writing to create the right, but its foundation resting in parol only, was a right at will and nothing else. The points discussed

(a) 8 East, 308.

upon the motion, were, whether this was an interest in land or an easement only; and if it were an interest in land, whether the defendant could stop the drain, without taking some previous step, to determine the estate at will; but when the state of the pleadings is adverted to, and when the nature of the right there claimed is considered, it is clear that a decision upon either of these points is unnecessary; and that if the case were to go to another trial, it must again terminate in a nonsuit. The declaration claimed the right as a license and authority granted to the plaintiff's landlords, "their heirs and assigns," to make the drain, and have the foul water pass from their scullery through the drain across the defendant's yard. One of the counts claimed it indefinitely, without fixing any limits. Others restricted it either to the time the defendant should continue possessed of his yard or house, or so long as it should be requisite for the convenient occupation of the plaintiff's house. Some of them stated, as part of the consideration, that the plaintiff's landlords should do some repairs to the defendant's premises; others did not. Now what is the nature of the interest which these counts assign? I take it to be clearly a freehold interest. In *Co. Litt.* 42 a, it is said, that "If a man, grant an estate to a woman, dum sola, &c., or as long as the grantee dwells in such a house, &c., or for any like uncertain time, which time, as *Bracton* saith, is *tempus indeterminatum*; in all these cases, if it be of lands or tenements, the lessee hath in judgment of law, an estate for life, determinable if livery be made; and if it be of rents, advowsons, or any other things that lie in grant, he hath a like estate for life *by the delivery of the deed*; and in count or pleading he shall allege the lease, and conclude that by force thereof, he was seised generally for the term of his life." Lord *Hale*, in his MS. notes, specifies two or three other instances; but adds, that in pleading, the limitation ought to be pleaded and continuance averred; and *Blackstone*, in his Commentaries, vol. ii, p. 121,

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lays it down, that a general grant, without defining the limits of the estate, passes an estate for life; and *Brewer v. Hill* (a), is an authority to shew that a lease of tithes by a vicar, so long as he shall continue vicar, passes an estate for life. Now what was the evidence to make out that this was the grant of an estate for life? It appeared, in evidence, upon the trial, that the drain was made in 1819, at the expense of the *Humphreys*, with the consent of the defendant, who was the occupier of the land, and of Mr. *Wills*, his landlord; and that the *Humphreys* laid out some money in improving the defendant's premises; but nothing was said as to how long the drain was to continue, nor was there any thing in writing between any of the parties; and when the inconveniences such a drain may occasion from smells, and from the necessity of cleaning it, are considered, it is almost impossible to suppose that Mr. *Wills* and the defendant meant to run all risks, and allow the parties an absolute interest so long as the defendant should continue in possession, or so long as it should be convenient, in the comfortable occupation of the defendant's premises. But suppose this had been the intention, can such an interest be created by parol? A right of way, or a right of passage for water, where it does not create an interest in the land, is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, and so forth. It does not lie in livery, but in grant; and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot) otherwise than by deed. In *Terms de la Ley*, a book of great antiquity and accuracy, I find that an easement is described to be, a privilege that one neighbour hath of another by *charter* or *prescription*, without profit; and it instances, "as a way or sink through his land, or such like." It is described as something that must have its foundation, either in *charter* or by *prescription*; and if I


(a) 2 Anstr. 413.

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am not mistaken, it says, in distinct terms, that it should be in *writing*. In *Co. Litt.* 9 a, Lord Coke notes a difference between corporeal things which lie in livery, and incorporeal, which lie in grant, and cannot pass but by deed, as advowsons, commons, &c. ; and it seems to be his opinion that, except in certain specified cases, where livery is necessary as to the one, a deed is necessary as to the other. And the same principle may be collected from the passage already cited from *Co. Litt.* 42 a. In *Co. Litt.* 169, the excepted case of parceners is mentioned, and there it is said, that though the common of estovers, or pasture, or a corody, or a way, lie in grant, they may, upon partition between the parceners, be granted without deed. Both *Littleton* and Lord Coke state in the same part, that a rent may be granted in the case of parceners for ovelty of partition, without deed ; and Lord Coke notices that rents, commons, advowsons, and the like, that lie in grant, though they cannot pass generally without deed, may be divided between parceners, by parol, without deed. Chattels, whether real or personal, may, in general, be granted without deed. That is laid down in *Sheppard's Touchstone*, 232 ; and in the case of things lying in livery, a demise of them may be made for any number of years at common law, without deed ; but Lord Coke, in *Co. Litt.* 85 a, notes a distinction between original chattels and chattels created out of a freehold lying in grant—that the former may pass without deed, the latter cannot be created or pass without it. Whether there is any distinction between such incorporeal things, created out of a freehold lying in livery, and a freehold lying in grant, I cannot take upon myself to say : I believe there is none ; but Lord Coke states, that the former may pass without deed, but that the latter cannot be created without it. It is not, however, necessary for us to decide that point in the present case, because this is the case of a freehold, and not of a chattel interest. *Sheppard*, in his *Touchstone*, 231, lays it down distinctly, that a licence or liberty, amongst other

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things, cannot be created or annexed to an estate of inheritance or freehold, without deed. In 2 *Roll. Ab.* 62, it is laid down, that a thing lying merely in grant, cannot pass without deed. In 9 *Rep.* 9, it is said, *arguendo*, that tenant for life cannot, by word, without deed, have the privilege of being dispunishable for waste; and *Sheppard*, in his *Touchstone*, 231, adopts that position. In *Gilbert's Law of Evidence*, 6th ed. p. 96, it is said, "if a man shews a title to a thing lying in *grant*, then he fails if the seal be torn off from the deed; for a man cannot shew a title to a thing lying in solemn agreement, but by solemn agreement; and there can be no solemn agreement without a seal, so that possession alone is no good title, since the thing itself doth not lie in possession, but in agreement; therefore a man cannot claim a title to a *water-course* but by deed, and under seal." For this he cites 3 *Bulstr.* 79; *Roll. Rep.* 188. In the first part of this position, Lord Chief Baron *Gilbert* is wrong, if the case of *Bolton v. Bishop of Carlisle* (a), be correctly decided; because it was there held, that if the deed be destroyed, other evidence may be given to shew that the thing was once granted. The general position, however, that a man cannot claim title to a thing lying in grant, but by deed, was not questioned in the latter case. Now this is a claim of title to a *water-course*, and according to the position laid down by Lord Chief Baron *Gilbert*, title cannot be claimed to it, but by deed, and under seal. In *Mont v. Butler* (b), where the plaintiff, in replevin, answered an avowry for damage feasant, by a plea of license, from a commoner who had right for twenty beasts, it was objected, that if the commoner could license, he could not do so without deed, and of this opinion was the whole Court. In *Harrison v. Parker* (c), where liberty, license, power, and authority, were granted to the plaintiff and his heirs, to build a bridge across a river, from plain-

(a) 2 H. Bl. 259.

(b) Cro. Jac. 574.

(c) 6 East, 154.

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tiff's close to a close of Sir *George Warren*; and liberty and license to plaintiff, to lay the foundations of one end on Sir *George's* close: the grant was by deed. And in *Fentiman v. Smith* (a), where the plaintiff claimed to have a passage for water by a tunnel over defendant's land; Lord *Ellenborough* lays it down distinctly, that "the title to have the water flowing in the tunnel over defendant's land, could not pass by parol, without deed." In addition to that, there is the case of *Lathbury v. Arnold* (b), in which there was a claim of a right of common as appurtenant to a cottage, which right of common had been underlet, the Court said, it could not be underlet without deed, unless by custom, and the custom set up being imperfectly and insufficiently stated, the Court gave judgment for the defendant, on the ground, that in the absence of custom, there could not be a demise of the right of pasture at common law without deed. Upon these authorities, we are of opinion, that although a parol license might be an excuse for a trespass until such a license was countermanded, the right and title to have passage for the water for a freehold interest required a deed to create it, and that as there has been no deed in this case, the present action, which is founded on a *right and title* derived from Messrs. *Humphrey*, cannot be supported. The case of *Winter v. Brockwell* (c), which was relied upon on the part of the plaintiff, appears clearly distinguishable from the present, because every thing that the defendant there did, he did upon his own land; he claimed no right or easement upon the plaintiff's land. The plaintiff claimed a right and easement against him; viz., the privilege of light and air through a particular window, and a free passage for the smells of an adjoining house through the defendant's area; and the only point decided there was, that as the plaintiff had consented to the obstruction of such his easement, and had allowed the defendant to incur expense in making such obstruction, he could not retract

(a) 4 East, 107. (b) 8 J. B. Moore, 72. 1 Bing. 217. (c) 9 East, 309.

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that consent without reimbursing the defendant such expense; but that was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission for the grantee to use his own land in a way in which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it. *Webb v. Paternoster* (a), *Wood v. Lake* (b), and *Taylor v. Waters* (c), were not cases of freehold interests; and in none of them was the objection taken, that the right lay in grant, and, therefore, could not pass without deed. These, therefore, cannot be considered as authorities upon the point; and on these grounds, therefore, that the right claimed by the declaration is a freehold right, and that, if the thing claimed is to be considered as an easement, not an interest in the land, such a right cannot be created without deed, we are of opinion, that the nonsuit was right, and that the rule ought to be discharged.

Rule discharged.

(a) Palm. 71.

(b) Say. 3.

(c) 7 Taunt. 2 Marsh. 551.

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Where A.,
 by an agree-
 ment under
 seal, agreed to
 take and hire

of B. a certain house and premises at a certain annual rent, but the instrument contained no words of demise, and there was nothing to shew when the interest was to commence or determine:—Held, that it was no more than an agreement for a lease, and being *sealed*, required a stamp for 1*l.* 15*s.*, as a *deed*, “not otherwise charged,” by 55 *Geo.* 3, c. 184, sch. part 1.

By the same instrument, A. agreed to take the fixtures, stock in trade, and such furniture as should be thought necessary, at a valuation to be made on a *future day*:—Held, that this was not an absolute conveyance of a present interest in the fixtures, &c., and *semble*, that assuming the instrument to be a lease, it would have required an *ad valorem* as well as a lease stamp.

THIS was an action of covenant, for the breach of an agreement under seal, and executed by the two defendants, in the following terms:—“Memorandum of agree-

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ment made and entered into, this 25th day of *September*, 1815, that is to say, we the undersigned *Henry, Richard, James, and Charles Burtenshaw*, in the county of *Sussex*, yeomen, do agree with Messrs. *Thomas Clayton, Henry Burtenshaw, and John Burtenshaw*, executors to the estate of the late *George Venall*, of *Henfield*, deceased, to take and hire of the said executors, for our son and nephew *Richard Burtenshaw*, all that house, shop, warehouse, and all appurtenances thereunto belonging, situate, lying and being in the town and parish of *Henfield*; in the county of *Sussex* aforesaid, at the yearly rent of 35*l.* per annum, we paying all taxes except the property-tax. It is also by these presents further agreed, that we will take all the stock in trade of grocery, linen-drapery, and haberdashery, and also all the fixtures and utensils in the shop and warehouse, and such part of the household furniture as we the undersigned shall think necessary for the use of our son and nephew *Richard Burtenshaw*, at a fair valuation, on the 11th day of *October* next coming; and for the consideration and amount of such stock, utensils, and household furniture, we do agree to pay or cause to be paid, the sum of 1,000*l.*, in the manner hereinafter mentioned, that is to say," &c. This instrument was sealed and delivered by the two defendants only. The declaration averred, that by a certain memorandum of agreement, made, &c., the defendants did *agree with* the plaintiffs to take and hire of the plaintiffs, all that house, &c, and it was also by the said agreement further agreed, that the said defendants and *James Burtenshaw, &c.*, would take, the stock in trade at a fair valuation, &c. Breach assigned in not taking the fixtures, &c., and paying for them in pursuance of the said agreement. Plea, non est factum, and issue thereon. At the trial before *Graham, B.*, at the last Lent assizes for the county of *Sussex*, the instrument being produced in evidence, and it appearing to be impressed with a 30*s.* stamp only, it was objected on the part of the defendants, that a stamp to

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that amount was insufficient, and that the instrument being under seal, must be considered as a deed "not otherwise charged," and therefore requiring a 35s. stamp, under 55 *Geo. 3*, c. 164, sch. part 1. The learned Judge concurred in the objection, and the plaintiffs were nonsuited, with liberty, however, to move for a new trial. In Easter term, *Marryat* moved accordingly, and obtained a rule nisi on the authority of *Corder v. Drakeford* (a).

Taddy, Serjt., now shewed cause. The learned Judge, who presided at the trial, was right in his view of the case. This is an agreement under seal, and therefore falls within the ordinary definition of a deed. By the Stamp Act, 55 *Geo. 3*, c. 164, a duty of 1*l.* is imposed upon agreements under hand only, and there being no mention of agreements under seal, it follows that this instrument must be treated either as a lease or a deed, requiring a suitable stamp. The question is, what description of deed it is to be considered. It will be contended on the other side, that it is a lease, and consequently, that a 30s. stamp is sufficient. Now, it is clearly not a lease, because there is no time or term for which the interest in the premises is created. To construe it a lease, some specific term, during which the interest is to continue, must be carved out. Here nothing of that kind appears. The words "we do agree to take and hire for our son and nephew, all that house, &c., at the yearly rent of 35*l.*," certainly do not import a leasehold interest. In *Bac. Abr.* tit. *Lease*, [K.], it is laid down, "that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will in construction of law, amount to a lease for years." Now, here, no determinate time is mentioned, and ac-

(a) 3 Taunt. 382.

According to the principle of law upon these subjects, this cannot be considered as a lease. In many modern cases it has been held, that words of agreement only, do not constitute a lease unless an interest is created for a specific time or term. The most recent of these are *Bole v. Bentley* (a), and *Doe v. Groves* (b). If, however, this is to be considered as a lease at all, it is not a lease only, but it is also a conveyance of goods. [*Bayley, J.* It is not an actual conveyance of the goods; it is only a bargain that the defendants *will* take the goods, &c., at a valuation]. It is submitted that it is an absolute conveyance of the goods, the only uncertainty being, as to the amount of the valuation. The effect of holding this stamp to be sufficient, would be, that goods to any amount might be conveyed without paying an ad valorem stamp duty. The case of *Corder v. Drakeford*, upon the authority of which this rule was obtained, is the converse of this case. There it was held, only, that the instrument being in law, a lease, it could not be read in evidence for want of a lease stamp; but it did not, therefore, follow, that a lease stamp only would have been sufficient. It is not necessary for the defendants to point out what stamp is necessary for the instrument; it is enough for them to shew that a 30s. stamp is not sufficient. It is clearly something more than a lease, because it also contains a conveyance of the goods, and consequently does not come within the description of a lease, which according to the 55 Geo. 3, c. 184, is subject to a stamp duty of 30s., but in the language of the schedule, must be treated as a deed "not otherwise charged," and therefore liable, at all events, to the duty of 1l. 15s.

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Marryatt and Chitty, contra. This instrument does not operate as a present conveyance of the stock and goods, and therefore the argument on the other side fails, in assuming that it would also require an ad valorem stamp, as

(a) 12 East, 168.

(b) 13 East, 244.

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well as a lease stamp. It is admitted that an absolute conveyance, either of real or personal property, would require an ad valorem stamp duty. But this is not an instrument of that description, because it remains uncertain what goods are to be taken until a valuation is made. The quantity of goods taken must depend upon the subsequent election of the parties, and therefore it is impossible to contend that this instrument operates as a present conveyance of the goods. Whenever the valuation should be made, it would of course require an appraisement stamp, and therefore, as respects the goods, this is only a preliminary agreement. But it is to be further observed, that the stock in trade, goods, &c., were to be taken as *incident* to the house and shop: according to the decision in *Corder v. Drakeford*, if the stamp be sufficient for the principal subject, it will cover the incident. Then is this a lease of the premises? It is not necessary there should be a specific, determinate, term of interest, specified in the instrument, in order to give it the legal character of a lease, provided a yearly rent be reserved. The instrument operates as a present demise, *upon its execution*, and although no time is fixed for its duration, yet as the yearly rent of 35*l.* is reserved, it clearly must be considered as a lease for a year. In this view of considering the case, the stamp of 30*s.* is sufficient, without regard to the personal property, which is conveyed as an incident to the house. The objection on the other side, if available, would be equally strong in those cases, where a lease is granted of a farm, reserving rent, with a covenant on the part of the lessee, to take farming stock, fixtures, &c., at a valuation to be made, either at the commencement or end of the term. The case of *Lecds v. Borough(a)*, decides, that although a deed may operate in two different ways, yet it does not necessarily follow that it shall have two stamps. [*Bayley, J.* That case was decided on the principle, that the stamp was an appraisement stamp; but if there be a

(a) 12 East, 1.

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lease simpliciter, operating as a permanent contract, and something else is added, can you contend that a lease stamp only would be sufficient?] The case of *Boase v. Jackson*(a), shews that the Court will look to the intention of the parties, and if there be no fraud intended, one stamp is sufficient. [Bayley, J. There the Court thought it one entire transaction. But assuming this to be a lease, still, is it not something more? But I doubt very much whether it is a lease, for here are no words on the part of the plaintiffs to bind themselves to let, nor do they appear to have executed the instrument. In the case of *Boase v. Jackson*, if the Court had held that there were two separate leases, they must have come to a contrary conclusion, and it could only be on the footing that it was one lease, that they held one stamp sufficient; here there is no statement when this, as a lease, was to commence, and when to determine]. If this be an improper stamp, it has arisen from a mistake at the stamp office, without any default of the plaintiffs.

BAYLEY, J.—I have no doubt whatever, that the nonsuit in this case was right. The statute 55 Geo. 3, c. 184, schedule, part 1, requires a specific stamp on leases. If this instrument were a lease, and a lease only, it would have required a 17. 10s. stamp, and nothing more. If it were a contract, not under seal, and having reference merely to a sale of goods, it would have required no stamp at all, because it would have come within the exemption applicable to contracts not under seal; but that exemption does not apply to agreements under seal. Now if this be a lease, and something more, then, in consequence of that additional circumstance, it may be, that an additional stamp is requisite; but under the circumstances of this case, it is not essential we should decide that point, for I am of opinion that this is not a lease at all. If it be an agreement, and not a lease, then it comes within that

(a) 6 J. B. Moore, 480. 3 Brod. & Bing. 185.

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part of the Stamp Act, which says, "that upon all deeds not otherwise charged, there shall be a stamp duty of 1l. 15s." In judging whether this be a lease or not, we are, in the first place, to look at the declaration, and see what the plaintiffs describe it to be. A deed is to be described according to its legal operation, and the plaintiffs in this case, are to make out that there is such a deed as that which their declaration describes. Does this declaration describe this as a lease? I think it certainly does not. It describes it as being a certain "memorandum in writing under seal, by which the defendants agreed with the plaintiffs to take and hire all that house and shop, lying and being, &c., at the yearly rent of 35l.," &c. That is the language of the *defendants* only. There are no words of *demise*; there is nothing which shews that the landlords have ever executed, or that they have at all bound themselves to execute or grant any lease. Looking, therefore, to the instrument itself, I am satisfied that we should be doing great injustice, not only to the defendants in this cause, but to other persons in similar cases, if we were to hold this to be a lease. There is a known distinction between an agreement for a lease and an actual lease. An agreement for a lease under seal, would require a 1l. 15s. stamp, and it is only on the principle that this instrument is an actual lease, we should be justified in holding, that a 1l. 10s. stamp would be sufficient. Now, according to all the cases, the instrument itself must be looked at, to see whether it was the intention of the parties that it should operate as a present lease or not. If it be clearly the intention of the parties that it should operate as a present lease, *adit quæstio*; although there should be a stipulation for some more formal instrument. Looking at this agreement, the defendants only agree "to take and hire of the said executors, for their son and nephew *Richard Burtenschaw*, all that house, &c., at the yearly rent of 35l. per annum, we paying all taxes, except the property-tax." Under

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this agreement, when is the interest to commence? Non constat? How long is it to continue? Non constat? We are, therefore, called upon to hold that an agreement not containing any words of present demise, is to operate as a lease, although we are wholly ignorant as to the time when the interest is to commence, or when it is to determine. Now could it have been the intention of the parties to stand upon this as a lease, and as a lease only? Looking at the other provisions in the instrument, it is quite manifest that they had no such intention. There is a bargain for the purchase of the stock in trade, fixtures, and of such part of the household furniture as should be wanted. Would a man purchase the fixtures, unless he knew for what time he was to have the house? Would he purchase the stock in trade for 1000*l.*, without being sure that he should have such an interest in the house as would enable him to repay himself, by carrying on the trade therein for some definite period of time? Can it be doubted that the parties were contemplating some interest in the premises which was to extend beyond a year? If this were not so; if, upon the execution of this instrument, and upon the payment of the purchase money for the goods, a notice to quit had been served, can any man doubt but it would have been such a hardship upon these persons as they had never contemplated a priori? If they expected that there would be any such power existing in the plaintiffs, is it not probable that there would have been a stipulation for a term? Upon a bargain of this description, when property to so large an amount was to be purchased, I never can believe that it was the intention of the parties that they should stand upon this instrument only, as a demise. In the course of the argument, I asked; when this, as a lease, would commence, and it was said, that it would commence the moment the instrument was executed. If that was so, then it must also operate as a conveyance of the goods instantane- But it is quite clear that the property in the goods, did not vest

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at the time the agreement was executed, because the property in them would not pass until the valuation had been made, and the first instalment paid. If this were to be considered as a present demise of the house, and an absolute conveyance of the goods, the consequence would be, that if by any accident the goods had been destroyed by fire, or stolen in the intermediate space of time, the defendants would be under the obligation of taking the house, without having the benefit which might result to them from having the possession of the goods, &c. But it would be very difficult to establish such a proposition. On these grounds, it appears to me, that this is what the declaration describes it to be,—not a lease, but an agreement for a lease only; and if so, then it is not within that part of the Stamp Act which applies to leases, but comes within those words referable to deeds not otherwise charged. I certainly entertain an opinion upon the question, whether, if this had been clearly a lease with an additional bargain for the purchase of the goods, it would not have required something beyond a lease stamp; but inasmuch as this is not a lease, but merely an agreement for a lease; I do not think it necessary, to express or bind myself by any opinion on that point. I think the nonsuit right; but it being suggested that the want of a sufficient stamp is attributable to a mistake at the stamp office, I think the nonsuit ought to be set aside, but upon the terms of paying costs, as between attorney and client.

HOLROYD, J.—I am of the same opinion. It is clear from the words of the agreement, that it does not amount to a lease, because it appears that the *defendants only agree to take and hire* the house, but there is no stipulation on the *part of the plaintiffs to demise and let*. Whether it might or might not have amounted to a lease, if it had contained words of demise, might have been a different question; but as the agreement is wholly silent upon this point, I think it cannot be taken to be a lease.

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I am still more clearly of opinion, that the agreement to take the goods, did not amount to a present conveyance thereof; because, that is only an agreement to be acted upon in futuro, but in the meantime, the property and the goods did not pass. I therefore think, upon the evidence given in support of the declaration, this instrument cannot be considered as amounting to a lease, but being an agreement under seal, it comes within the description of deeds not otherwise charged, and requiring a stamp duty of 1*l.* 15*s.*

LITLEDALE, J.—It appears to me that the nonsuit in this case was right, whether the instrument amounts to a lease or an agreement. If it amounts to an agreement under seal, then it must be considered in the language of the schedule, as a deed “not otherwise charged,” and therefore requiring a 3*s.* stamp. But assuming it to be a lease, I am still of opinion, that it ought to have had an additional stamp. It is said, that the stipulation respecting the fixtures, stock in trade, &c., is merely an incident or accessory to the house. As respects the fixtures, that is perfectly true, but clearly not so with regard to the goods. The fixtures may form a part of the premises, of which the party is seised, but that is not so with respect to moveable chattels on the premises, though it might be intended that they should go with the house. I consider them in the same light, as if they were not at all on the premises. The words of the act of parliament, apply only to leases of lands, and not to goods which go to the executor and not to the heir. The statute applies only to something which is capable of being let. Here is an agreement referable to goods which are not the subject of a demise. I have no doubt, therefore, that assuming the agreement, as to the house, amounts to a lease, still an additional stamp was requisite with reference to the goods. But not being a lease, we are to consider this instrument as an agreement under seal, and therefore

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liable to the stamp duty imposed upon deeds not otherwise charged. The act of parliament only excludes agreements under hand: but as this is an agreement under seal, I think it comes within the description of deeds not being otherwise charged, and therefore ought to have a 35s. stamp. It is said, that if this be the law, it will be productive of great inconvenience to all persons who have taken leases of farms, with a covenant to pay for fixtures, and stock, &c., at a valuation to be made, either at the commencement or determination of the term; but we cannot help that; we are bound to declare the law without regard to consequences. It appears to me, without any doubt whatever upon the subject, that this being an agreement under seal, required an additional stamp.

Rule absolute, upon payment of costs, as between attorney and client.

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By 3 Geo. 4, c. 126, s. 65, **DEBT**, on the 3 Geo. 4, c. 126, s. 65, for penalties. At the trial, before *Burrough, J.*, at the *Wilts. Lent assizes*, 1825, the plaintiff obtained a verdict for one 100l.

“no trustee of any turnpike road shall have any share, or interest in, or be in any manner directly or indirectly concerned in any bargain or contract for making, or repairing, or in any way relating to the road for which he shall act; nor shall let out for hire any cart, or horse, for the use of any turnpike road for which he shall act as a trustee; or shall by himself, or by any other person, for or on his account, directly or indirectly, receive any money to his use or benefit, out of the tolls collected on the road for which he shall act, during the time he shall be acting as a trustee of such road: and every trustee so offending, shall for every such offence, forfeit 100l.” By s. 143, “If the penalty exceeds 20l., it shall be recoverable by action of debt in any of the superior courts, and the plaintiff, if he recover in any such action, shall have full costs; provided, that there shall not be more than one recovery for the same offence, and that 21 days’ notice be given to the party offending, previous to the commencement of the action; and that the same be commenced within three calendar months after the offence for which the action is brought, shall have been committed.” *A.* having contracted with the trustees of a turnpike road, to repair the road for a specific sum, *B.*, one of the trustees, let out to *A.* his horse and cart for 5s. a day, and they were used in the repair of the road. In debt against *B.* for penalties:—Held, first, that *B.* was liable to the penalty imposed by s. 65. Second, that the notice of action, not stating that *B.*, when he let out his horse and cart, was acting as a trustee, was bad. And, third, that the notice being bad, the plaintiff was barred, not only of his right to costs, but of his right to sue.

penalty, subject to the opinion of the Court upon the following case:—

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A considerable time previous to *July* 1824, and at the time of the commencement of the action, the defendant was one of the trustees or commissioners of the turnpike road leading from *Wincanton* in the county of *Somerset*, to and through the parish of *Mere*, in the county of *Wilts.*, to *Willoughby Hedge* turnpike gate, in the county of *Wilts.*, and had acted as such, and had ordered the surveyor on different occasions, where to lay stones on the road. It being determined by the commissioners to improve that part of the road situate between *Mere* and *Willoughby Hedge*, they caused a meeting of commissioners for the purpose of letting the same by tender to be advertised, to be held at the Town Hall, *Wincanton*, on the 17th *July* then instant. That meeting was held accordingly, at which the defendant attended with other commissioners, and acted with them, when a contract for making the intended improvement was entered into with one *Hodgkinson*, who agreed to perform the same according to a plan and specification, for the gross sum of 119*l.* *Hodgkinson* commenced his work about the 20th of the same month, at first, with men only, but afterwards applied to the defendant to let him his horses and carts. The defendant agreed to let them at the rate of 5*s.* a day for a horse and cart, and accordingly furnished three horses and three carts for about a week, and afterwards a greater number, which were used in hauling earth and stones on the part of the road agreed to be improved by *Hodgkinson*. *Hodgkinson* told him what they were for, and saw the defendant there while the horses and carts were being so used. He paid the defendant for the letting of each horse and cart, by an order on Messrs. *Messiter*, the treasurers of the trustees, but without any reference to his, *Hodgkinson's*, contract with the trustees; and the whole was so paid by *Hodgkinson*, previously to the payment of his own demand, by the trustees,

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according to the contract. The defendant's horses and carts were used on the part of the road in question on one of the days specified in the notice. *Hodgkinson* went to the defendant, and asked him for his horses and carts; the defendant did not go to *Hodgkinson*. *Hodgkinson* hired horses and carts of other persons, and paid all alike. On the 19th *October* following, and 21 days before the commencement of the action, the defendant was personally served with the following notice :—


“ SIR,

“ You being one of the trustees and commissioners of the turnpike road leading from the town of *Wincanton* in the county of *Somerset*, to and through the parish of *Mere* in the county of *Wilts.*, unto *Willoughby Hedge* turnpike gate in the said county of *Wilts.*; and having on divers days, to wit, on (several days in *August*, specifically mentioned), supplied materials for the use of that part of the said turnpike road which is in the parish of *Mere*, and having also on the aforesaid days, let out for hire, your waggon, wain, carts, horses, and teams, for the use of that part of the said turnpike road, which is in the parish of *Mere* aforesaid, contrary to an act passed in the third year of the reign of his Majesty *George the Fourth*, whereby you have forfeited the penalty or sum of 100*l.* for each of the aforesaid offences so committed by you, amounting, together, to the sum of 700*l.*; I do therefore, according to the act, give you notice, that I shall, at, or soon after, the expiration of 21 days from the time of your being served with this notice, commence and prosecute an action of debt against you in one of his Majesty's courts of record for the recovery of the said sum of 700*l.*”

The action was commenced within three calendar months after the horses and carts above mentioned had been let, furnished, and used as aforesaid.

Jeremy, for the plaintiff. There are two questions in

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this case. First, whether the defendant, being a trustee of the road at the time when he let out his horses and carts to the person who had contracted to repair the road, has incurred the penalty inflicted by the 65th section of the statute, the 3 Geo. 4, c. 126. Second, whether the notice of action served upon the defendant, is a sufficient notice within the 143d section of that statute, and gives the plaintiff a right to sue. First, the defendant has clearly incurred the penalty inflicted by section 65. That enacts, "that no trustee of any turnpike road shall enjoy any office or place of profit under any act of parliament, in execution of which he shall have been appointed, or shall act as trustee or commissioner, or have any share or interest in, or be in any manner directly or indirectly concerned in any contract or bargain for making or repairing, or in any way relating to the road for which he shall act:"—then, "that no such trustee shall let out for hire any cart, &c., or any horse, &c., for the use of any turnpike road for which he shall act as a trustee or commissioner; nor by himself or by any other person for or on his account, directly or indirectly, receive any sum or sums of money to his use or benefit, out of the tolls collected on the road for which he shall act, during the time he shall be acting as a trustee or commissioner of such road:"—and then, "that if any person after having been appointed a trustee or commissioner of any turnpike road, shall, without having first resigned his office, be concerned in any such contract or bargain, or let out for hire any cart, horse, &c., or receive any money out of the tolls aforesaid, every trustee or commissioner so offending shall for every such offence, forfeit 100l." The object of the legislature in enacting that clause, was to prevent the trustees of roads from deriving any profit, direct or indirect, from any work done upon the roads, which would probably lead to an abuse of their trusts. The defendant, therefore, is clearly within the mischief intended to be remedied by the act; he is within the

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express *letter* of the act: and the jury, having found by their verdict that he is within the *spirit* of the act, the Court will feel itself bound by that finding. *West v. Andrews* (a), though founded upon a different act of parliament, is an analogous case, and an authority in support of the present action. Secondly, the notice of action given in this case, satisfies the requisites of section 143. That enacts, "that if the penalty shall exceed 20*l.*, it shall be recoverable by action of debt in any of the superior courts, and the plaintiff, if he recover in such action, shall have full costs; provided that there shall not be more than one recovery for the same offence, and that 21 days' notice shall be given to the party offending, previous to the commencement of such action; and that the same shall be commenced within three calendar months after the offence for which such action is brought shall have been committed." The object of the legislature in enacting that clause, was only to deprive the party who neglected to give a notice of action, of his costs; but, supposing they intended a want of notice to operate as a bar to the action, still this action is maintainable; for the notice is expressed after the very words of the statute. The 24 Geo. 2, c. 44, requires that the notice should set forth and explain the cause of action at full; therefore the cases decided upon that statute cannot govern the present case, inasmuch as the present statute contains no such requisite. It has been held even with respect to statutes requiring notice of action to magistrates, that a notice apprising the magistrate of the nature of the action about to be brought against him, was sufficient; *Robson v. Spearman* (b), *Jones v. Bird* (c): here a notice 21 days previous to the commencement of the action, is all that is required, and that the case states to have been given. Upon both points, therefore, the action is maintainable.

(a) Ante, vol. ii. 164. 5 B. & A. 828. 1 B. & C. 77.

(b) 3 B. & A. 493. (c) Ante, vol. i. 497. 5 B. & A. 837.

R. Bayly, for the defendant. First, the notice is clearly bad. The section requiring notice was inserted for the benefit and protection of the defendant, and is, therefore, to be construed liberally, in his favour. The object of requiring it, was that the defendant might understand the nature of the charge intended to be brought against him, in order to prepare himself to answer it. But this notice effects no such object, for it does not set out any cause of action, or shew that the defendant has committed any offence against the statute. It does not even allege that he was a trustee or commissioner acting in execution of the statute, at the time when he let out his carts and horses to hire; and, therefore, does not bring the defendant within the description necessary to render him amenable under the statute. It does not state in which of his Majesty's courts the action is intended to be brought, which, by analogy to other cases, it should do; for it has been held, under the 24 Geo. 2, c. 44, which requires the notice to state the nature of the writ and process intended to be issued, that a notice not describing the nature of the writ or process, was bad, *Lovelace v. Curry* (a). This notice, therefore, fails to incorporate with itself both the letter and the spirit of the statute; it is consequently bad: for a declaration so framed, would be bad in arrest of judgment. Then, the notice being bad, that defect operates not merely to deprive the plaintiff of his costs, but to bar him of his right of action; for the proviso is not confined to the subject-matter immediately preceding it, but extends to all the previous parts of the sentence, one of which confers the right of suing in the superior courts. Secondly, be the notice good or bad, the defendant is not liable to the penalty now sought to be recovered from him. His agreement with *Hodgkinson* was not a contract made for the use of the road, within the meaning of the statute; it was a contract for a specific sum: and whether his horses performed more or less work

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(a) 7 T. R. 631.

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was perfectly immaterial to the commissioners. No mischief, therefore, could result from such a contract, for no fraud could be effected by it, and no undue profit or advantage be derived from it. It was a subordinate contract made with the original contractor, entered into alio intuitu from that made with the commissioners, and as such was neither within the language or the meaning of the act of parliament.

BAYLEY, J.—Upon the first question in this case, namely, whether the defendant has committed an offence within the meaning of the 3 Geo. 4, c. 126, s. 65, I entertain no doubt whatever. I am clearly of opinion that he has, at least within the spirit of the act. The real object of the legislature was to prevent any communication in the way of bargaining between the commissioners and the contractors, which might give the former an interest incompatible with their duty. One of the duties of the commissioners is to provide that the work done upon the roads is contracted for at the smallest possible expense; but if the commissioners may let out their own horses and carts for hire to the contractors, it must follow that where several persons make tenders for the work, it will be the interest of the commissioners to select such of them as will hire their carts and horses, without reference to his merits in other respects. This case, therefore, is clearly within the mischief intended to be guarded by the act; and it seems to me to be within the letter of the act also, because the defendant did let out his horse and cart for the use of the road of which he was a commissioner. The second question is, whether the notice of action given in this case was such as entitled the plaintiff to sue; which subdivides itself into two other questions: first, whether, according to the true construction of this act of parliament, a party altogether omitting to give notice, or giving an insufficient notice, is deprived of his right to costs only, or of his right of action entirely; and second, whether the

notice given by the present plaintiff, was such a notice as s. 143 of the act requires. I am of opinion that the omitting to give any notice, or the giving a defective notice, deprives the party, not only of his right to recover costs, but of his right to recover a verdict. The section provides that where the sum sought to be recovered exceeds 20l., the plaintiff shall sue in the superior courts; and, if he recovers, shall have full costs, provided that there shall not be more than one recovery for the same offence, and that 21 days' notice shall be given to the party offending, previous to the commencement of the action, and that the same shall be commenced within three calendar months after the offence committed. Whether this proviso relates only to the subject-matter immediately preceding it, namely, the costs, or to the whole of the preceding sentence, depends upon the context, and the nature of the other parts of the proviso itself. The first part of the proviso, namely, that there shall be only one recovery for one offence, could not be intended to apply to the right of recovering costs only; for the legislature certainly did not intend to subject a defendant to several actions, for the same offence, merely upon the condition of the plaintiff's foregoing his costs. So, with respect to the last part of the proviso, the legislature could not have intended to subject a defendant to an action to be brought at any indefinite and unlimited period of time, merely upon the condition of the plaintiff's foregoing his costs. Two, therefore, out of three parts of the proviso, clearly applying to the whole of the preceding sentence, the fair inference is, that the third part has an equally extensive application, and then it follows that the giving the notice required by the act is a condition precedent to the right to sue. Then, is the notice given in this case, such as is required by the act? The notice required is one 21 days previous to the commencement of the action. That must mean, that some communication, and explanation, of the plaintiff's intentions should be given to the defendant. A

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notice, simply stating that the defendant had offended against the act, would clearly not be sufficient, and if so, it is plain that some particularity of statement is essential to the validity of the notice. It seems to me, at all events, necessary that the notice should shew, upon the face of it, that some offence against the statute has been committed; and unless the defendant, at the time when he let out his horse and cart to *Hodgkinson*, was acting as a commissioner under the statute, he committed no offence in so doing. Now the notice does not state that he was then acting as a commissioner; an indispensable ingredient in the offence charged, therefore, is omitted, and upon that ground the notice is bad. For these reasons I am opinion that a nonsuit must be entered.

HOLROYD, J.—I am of the same opinion. I am now perfectly satisfied, though I at first entertained some doubt upon the point, that the proviso extends over the whole preceding part of the section requiring the notice; and consequently, that the plaintiff not having complied with all the terms of the proviso, is barred, not only of his right to costs, but of his right to maintain the action.

Judgment of nonsuit.

RIPLEY and another v. SCAIFE.


Where a vessel was chartered for six months certain, the

freighter to pay 200*l.* per month, and so in proportion for any longer time she might be employed, the owner to keep the ship in repair during the voyage: and in consequence of perils of the sea the vessel was obliged to be repaired twice in the course of the voyage, which detained her uselessly to the freighter for 38 days:—Held, that he was still liable for freight during such detention.

THIS was an action of assumpsit to recover back the sum of 184*l.*, which the plaintiffs had paid as freight, in order to obtain possession of a cargo freighted on board a vessel,

chartered to them by the defendant. The declaration contained special counts on the charterparty, and also the common counts, to all of which the defendant pleaded the general issue. At the trial before *Abbott*, C. J., at the *London* adjourned sittings after last *Michaelmas* term, the case was this. The defendant was owner of the ship *Alliance*, and entered into a charterparty with the plaintiffs, on the 21st *June*, 1821, for the voyage in question. By the charterparty, it was mutually agreed that the said vessel should, at the defendant's expense, be made, and during the voyage be kept tight, staunch, and strong, and well found and provided in all necessary stores, and should take on board at *Liverpool*, from the plaintiffs, a cargo not exceeding, &c., and without delay set sail, and proceed to the island of *St. Thomas*, and make delivery there, according to the bills of lading, and should then take in other goods for *St. Domingo*, and make delivery there, and after such delivery the said ship should, at the defendant's expense, be immediately made ready to perform her homeward voyage. On the part of the plaintiffs, it was agreed that they would pay to the defendant, for the freight of the said vessel, after the following rate, viz: the sum of 200*l.* *British* sterling per month, for six months certain, and so in proportion, for any longer time she might be employed; the said pay to commence from the 25th *July*, then next, or should the vessel sail from *Liverpool* before that day, then the pay should commence from the day of sailing, and so continue until her arrival into dock, at the homeward port of discharge; and should *London* be the port of discharge, then the plaintiffs were to pay 100*l.* more. It appeared that the vessel proceeded from *Liverpool* with her outward cargo to *St. Thomas*, and having there discharged, took in a fresh cargo for *St. Domingo*. On her arrival there, the vessel being in want of repairs, they were effected at the expense of the defendant. The time occupied in doing these repairs, was 28 days. The vessel then took in a homeward cargo for the port of

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London. The master having received instructions from the plaintiffs to call for orders at *Cork*, was proceeding to that port, but by stress of weather was forced to put into *Liverpool*. On examination, it was found that the vessel could not proceed to *London* without additional repairs, and she was detained at *Liverpool* ten days for that purpose. On the 9th *April*, she arrived in *London* and delivered her homeward cargo. On setting the freight, the defendant insisted that he was entitled to freight during the several times that the vessel was under repair at *St. Domingo* and *Liverpool* respectively, and for these periods demanded 184*l.*, which sum the plaintiffs paid in order to obtain possession of the cargo, and brought the present action to recover the said money back. The question was, whether upon the construction of the charterparty, the plaintiff was bound to pay freight during the time the vessel was under repair in the progress of the voyage. The jury, under the learned Judge's directions, found their verdict for the defendant.

Scarlett now moved for a rule nisi for a new trial on the ground of misdirection. It is submitted that the plaintiffs were not bound to pay freight during the time the vessel was under repair. Undoubtedly the plaintiffs would be liable for freight as long as the vessel was beneficially employed for them in the progress of the voyage; but it is contended, that whilst the vessel was out of their possession and control for the purposes of repair, their liability to pay freight wholly ceased, for during that time she was entirely under the management of the owner, without any power on the part of the plaintiffs to interfere. [*Bayley, J.* Suppose the vessel to be captured and recaptured during the period comprehended in the charterparty, would not the freighter be liable during the time the vessel was in the hands of the enemy?] This being a mercantile instrument, ought to be construed with a reasonable intentment. It is not denied, that if whilst the cargo is on board,

the ship receives a slight sea damage and she is obliged to put into a port for a day or two to refit, the freighter would be liable so long as the cargo remained on board ; but if the sea damage be such as to require the cargo to be discharged, and the possession of the vessel is surrendered exclusively to the owner, then she ceases to be in the employment of the freighter, and consequently he is not liable for freight during the time occupied in repairing. Suppose the repairs require six months to complete them, could it be contended that during all that time the plaintiffs would be liable to freight, although the vessel was wholly out of their employ ? By the terms of this charterparty, the defendant was bound to keep the vessel in repair during the voyage at his own expense, and upon such undertaking the plaintiffs agreed to pay freight at the rate of 200*l.* per month, for six months certain, and so in proportion for any longer time she might be employed in their service. Can it then be said, that she was in their employment during the 28 and ten days that she was wholly out of their possession or control for the purposes of reparation ? If it be held that the plaintiffs are liable to pay freight for that time, the effect of such a decision will be to make the plaintiffs pay for those repairs which the defendant, as owner, was bound to effect, which would be in contravention of the terms of the charterparty. Upon the sound construction of this instrument, therefore, the plaintiffs cannot be liable for freight during the time the vessel was out of their employment. In cases of this nature, the owner of the ship may have his indemnity by insurance, for he may insure the freight, as well as the ship, against the perils of the seas.

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ABBOTT, C. J.—I am still of opinion, that the vessel was in the employment of the charterers during the time occupied in effecting the repairs, and, consequently, that the plaintiffs are not entitled to recover back the money which they have paid as freight whilst the vessel was

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under repairs. It is expressly stipulated in the charterparty, that the plaintiffs shall pay freight from a certain day, *for six months certain*, and for such longer time as she should continue in their employment. I recollect that in my address to the jury, I told them I should be greatly dissatisfied, if, upon the construction of an instrument of this nature, such an effect were given to it, as was contended for by the plaintiffs, when it was so easy for them to have introduced a special provision, stipulating, that in case the cargo should be discharged, for the purposes of repairing the vessel, or for any other purpose not immediately connected with the voyage, the payment of freight should not run during such period; and the jury expressed their satisfaction with my view of the case, one of them observing, that such a stipulation as I had suggested, was always introduced into the East India Company's charterparties. Unless there be a special provision to that effect, it seems to me, that notwithstanding the vessel is detained on her voyage, for the purpose of repair, she is still to be considered as in the employment of the charterers, and that they must pay freight during the time of such detention. These are mere matters of bargain; and at the time of entering into the charterparty, it might have been stipulated between the parties, that the charterer should not be liable for freight in case of any detention on the voyage, in order to repair the vessel. No such stipulation having been introduced into this instrument, I am of opinion, that the objection relied upon by the plaintiffs, is without foundation.

BAYLEY, J. — The construction of this charterparty, turns upon the meaning of the equivocal word "employ." It is agreed on the part of the defendant, that the vessel shall, at his expense, be kept tight, staunch, and strong, &c., during the voyage. Now the law would imply an obligation on the part of the owner, to keep the

vessel in repair during the voyage, and therefore we are at liberty to put the same construction upon this charter-party, as if no such stipulation had been introduced. There is one expression in this instrument which throws great doubt upon the construction which ought to be put upon it. The freight is to be paid at the rate of 200*l.* sterling per month, for six months certain, and so in proportion for any longer time she might be *employed*. The meaning of the word *employed*, may be so long as she continued in the plaintiffs' service, commencing on the 25th *July*, or the day on which she sailed from *Liverpool*, and so continued until her arrival into dock at the homeward port of discharge. The reasonable inference from this stipulation is, that the freight was to be payable from the day she sailed, and so continue until her arrival in her homeward port of discharge, or in other words, so long as she was absent from this country. If the plaintiffs meant to exempt themselves from the liability to pay freight whilst the vessel was undergoing necessary repairs, they ought to have insisted upon that as matter of express stipulation at the time the charter party was executed. It may probably happen in most cases, that when a vessel arrives outwards, some few days must be occupied in necessary repairs in order to take the homeward cargo in; but if the freighter intends to exempt himself from freight during such interval, that intention should be distinctly expressed.

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LITLEDALE, J. (a).—I am of the same opinion. It is agreed by this charterparty, that freight is to be paid at the rate of 200*l.* per month, for six months certain, and so in proportion for any longer time the ship might be *employed*. This is merely an extension of the time during which the vessel might be out, and this stipulation is the same as if the charter had said, that the freight was to be paid at that rate from the commencement of the voyage until

(a) Holroyd, J., was in the Bail Court.

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the vessel had arrived in her port of discharge in *Great Britain*. It is true that during the time the vessel was under repair, she was not *sailing* on her voyage; but if at that time she had her cargo on board, she must be considered as being in the employment of the charterer, because she then has her cargo on board, for the purpose of making the voyage which is the subject of the charter-party. The same inference must arise, supposing an accident happened at her moorings which would prevent her either discharging the outward or taking in the homeward voyage, until repairs were effected. Many inconveniences may occur in the course of a voyage, not contemplated by either party, which would not vary the charterer's liability. Suppose, in the very outset of the voyage, an accident happens to the vessel which obliges her to put into some port for repairs, and she is there detained a considerable time; still the charterer would have to pay freight during all the time, although the vessel was of no use to him with a view to the ulterior prosecution of the voyage. It seems to me, therefore, to make no difference, that the term of six months certain is introduced into the charter, and that the word *employed* is to be construed with reference to the time the vessel is absent from her home port, upon the business of the charterer.


Rule refused.

WOOLLEY and others, assignees of DOWMAN and OFFLEY, bankrupts, v. JENNINGS and another.

Where
 there was a
 running ac-

THIS was an action of trover for certain bills of exchange, the property of the bankrupts. . Plea, the general account between A. and B., and the former gave the latter a warrant of attorney, with a defeazance, stating it to be given as a security for 4000*l.*, and lawful interest thereon:—Held, that it was a continuing security, applicable to any balance which might at any time be due, and was not discharged by payments exceeding 4000*l.* between the date of the warrant of attorney and the time of entering up judgment thereon.

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issue. At the trial before *Abbott*, C. J., at the *London* adjourned sittings after last *Michaelmas* term, the case turned upon the construction to be put upon the defeasance of a warrant of attorney given by the bankrupts to the defendants. It appeared that *Dowman* and *Offley*, being indebted to the defendants, gave the latter a warrant of attorney, on the 10th *January*, 1823, on which was written a defeasance, in the following terms: "The within warrant of attorney is given to secure the payment of the sum of 4000*l.*, with lawful interest thereon." On the 4th *October*, 1823, *Dowman* and *Offley* being then indebted to the defendants in the sum of 1000*l.*, upon the balance of accounts between them, the latter entered up judgment, and took out execution thereon, under which the bills of exchange in question were seized. Between the 10th *January* and the 4th *October*, the bankrupts had, in the course of their dealings, made payments to the defendants to the amount of 4000*l.*, and upwards. The bankruptcy took place on the 29th *October*, and the question was, whether by such payments the warrant of attorney was not discharged at the time the judgment was entered up. For the plaintiff it was contended, that, as there had been a running account between the bankrupts and the defendants, the payments made to the latter from time to time could not be appropriated to any particular part of the account; and, consequently, the warrant of attorney was discharged. For the defendants it was contended, that the warrant of attorney was not discharged by the various payments exceeding 4000*l.* which had been made between the date of the warrant of attorney and the time of signing judgment, but remained a continuing security for the ultimate balance. The jury, under the learned Judge's directions, found for the defendants.

Copley, A. G., now moved for a rule nisi for a new trial. The question is, whether the warrant of attorney was in

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force at the time the judgment was signed and execution taken out. It is submitted, that the payments made by the bankrupts, between the date of the warrant of attorney and the 4th *October*, when judgment was signed, discharged the money for which the security was given, and consequently, that the warrant of attorney was then functus officio. Where there is a running account between parties, as in this case, payments made by the debtor are to be applied in discharge of those items on the debit side, according to priority of date; and, therefore, as the payments made by the bankrupts, in the interval between the 10th *January* and the 4th *October*, exceeded the sum of 4000*l.*, for which the security was given, the warrant of attorney is discharged. It is a general principle of law, that, upon a running account, consisting of a great many items, it is not competent for the creditor to apply particular payments to a particular part of the account, and thereby vary his debtor's liability; This is the leading principle of all the modern decisions. *Clayton's case (a)*, *Bodenham v. Purchas (b)*. Here there is nothing to shew that this was to be a continuing security; and, therefore, as payments had been made exceeding the sum for which it was given, it was not competent for the defendants to put it in force for the balance which happened to be due at the time the judgment was signed.

ABBOTT, C. J., adhered to his opinion at nisi prius, that the warrant of attorney was not discharged.

BAYLEY, J.—This is a question of construction upon the terms of the defeazance. It is probable, that at the time the warrant of attorney was given, there was more money due to the defendants than the defeazance specifies. There is nothing to shew that the warrant of attorney was to be discharged as soon as payments were made to the amount of 4000*l.* The plain inference from the terms of

(a) 1 Meriv. 572.

(b) 2 B. & A. 39.

the defeazance is, that the warrant of attorney was to remain as a security, at all events, to the extent of 4000*l.*, at whatever period the accounts between the parties were taken. If we are to look at the nature of the security, and the course of dealings between the parties, we must give effect to the import of the defeazance, especially where the language is ambiguous, and may be applicable either to a balance due at the time the warrant of attorney was given, or as a running security for the balance which should be ultimately due. It is obvious that this is meant as a security, at all events, to the extent of 4000*l.*, and with a view to the continuance of dealings between the parties. Unless it was meant as a continuing security, it might very soon have become of no use at all: because if the bankrupts had made payments to the defendants to the amount of 4000*l.* shortly after the date of the security, and then, became indebted again on a running account, the defendants would have had no remedy. In the absence, therefore, of some expression on the face of the warrant of attorney, or of the defeazance, shewing that it was intended to secure only the balance due at the time it was given, I am of opinion that it must be construed as a continuing security for any balance which might be afterwards due to the defendants. This is not like the case of *Kirby v. the Duke of Marlborough* (a), where there was an express stipulation on the part of the defendant, not to be answerable for monies advanced, exceeding a certain sum. But here, assuming the language of the defeazance to be equivocal, I am of opinion, that looking at the terms of the warrant of attorney, it is to be considered as applicable to any balance which might appear to be due at any time from the bankrupts to the defendants.

HOLROYD, J., concurred.

LITTLEDALE, J., was absent.

Rule refused.

(a) 2 M. & S. 18.

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The Governor and Company of the BANK of ENGLAND
v. DAVIS. (*In Error*).

Where an action was brought against the Bank of *England* for a breach of *duty* in not paying dividends due to the plaintiff upon stock standing in his name in the bank books :—
Held, in error, that the action was not maintainable, for not shewing that money had been actually issued by Government to the Bank, to pay the dividends in question, at the time of the alleged breach of duty.

CASE against the Bank of *England* for an alleged breach of duty, in permitting, without lawful authority, a transfer of stock, standing in the name of the defendant in error, and for refusing to pay him the dividends thereon. The declaration contained four counts : upon the second and fourth of which, the court of Common Pleas gave judgment for the plaintiff below ; and, on such judgment, the defendants below now brought error. The second count stated, that before the time of the committing of the grievances thereafter next mentioned, the plaintiff below was lawfully possessed of a certain other large sum, to wit, 10,000*l.*, 3 per cent. consolidated annuities, which said last-mentioned stock, before the time of the committing of the said last-mentioned grievances, was in the care of the defendants, and standing in the public books of the defendants, in the name of the plaintiff, for the purpose, amongst other things, of paying to the plaintiff, or to such person or persons as he should legally appoint for that purpose, all the dividends, interest, and produce, which might and should accrue due for and in respect of the said last-mentioned stock, whilst the same should not be transferred to any person or persons in the said books, with the order and authority of the plaintiff ; and that before, and at the time of the committing of the grievances thereafter mentioned, the plaintiff was entitled to the said last-mentioned stock, and the same had not been, nor was, transferred in the said books to any person or persons, with the order or authority of the plaintiff ; and, *thereupon, by reason of the premises in that count mentioned, the defendants became, and were liable, and it became and was their duty to pay to the plaintiff, or to such person or persons as he should legally appoint for that purpose, all the dividends, interest, and produce, which might and would accrue due,*

for and in respect of the said last-mentioned stock, whilst the same was not transferred in the said books to any person or persons, with the order and authority of the plaintiff. Averment, that the plaintiff requested defendants to pay the dividends which had accrued due on the said stock on the 3d *September*, 1820, and breach by the defendants. Fourth count, similar to the second, except that the duty and breach thereof had reference to dividends claimed to be due upon 178*l.* 18*s.*, long annuities. After argument on a special case in C. P., judgment was given below, as above stated. The facts therein mentioned were then set out on special verdict; and, upon a writ of error, brought by the defendants below, the record was removed into this Court, and errors assigned on the second and fourth counts of the declaration.

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Bosanquet, Serjt., for the plaintiffs in error. There is a manifest error on the face of this record, which entitles the plaintiffs to judgment, without regard to any other question which may be raised in argument. This in an action on the case for an alleged breach of *duty* on the part of the plaintiffs, in refusing to pay to the defendant the dividends stated to be due on the stock standing in his name in the books of the Bank of *England*. Now, before the plaintiffs can be charged with a breach of duty in this respect, it must appear, either on the declaration or as a fact, in the special verdict, that the plaintiffs had actually received the money which they are charged with having refused to pay over to the defendants. Both the declaration and the verdict are silent upon this point; and as the duty is, therefore, incorrectly stated, it is a fatal objection in limine. The Bank of *England* are not responsible for the payment of dividends by the government; they are the mere servants of government; and if at the time the dividends are due, the money is sent by the Exchequer, and they neglect to pay it, then, indeed, they would be guilty of a breach of duty; but until

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the money actually comes into their hands, no duty attaches upon them. Their duty is merely to pay such money as they receive; and as there is here no breach of duty assigned, the plaintiffs are entitled to the judgment of the Court upon this record. [He was here stopped by the Court].

Tindal, contra. This objection comes rather of the latest, it never having been suggested in any prior stage of these proceedings. [*Bayley*, J. If we were to give judgment in your favour upon this record, and the case were to go to the House of Lords, the objection would still be open to the plaintiff in error]. It is submitted, however, that the objection is untenable. It will not be denied, that by the acts of parliament creating the public stock, it is the duty of the Bank of *England* to pay the dividends to the stock holders as those dividends are received. The objection then is, that it is not stated on this record, that the money was in fact received by the Bank of *England* for the payment of the dividends in question. To that objection the answer is, that as by the public acts of parliament creating the stock, it is directed that certain sums of money, equivalent to the amount of dividends due to the stock holders, shall be issued every year from the Exchequer, to pay the dividends that are due half-yearly, this Court will take judicial notice, and presume, until the contrary is shewn by the Bank of *England*, that the Lords of the Treasury have discharged their public duty, and issued the money for the payment of these dividends. There are many cases which decide this principle, that where there is a duty cast by the law on public functionaries, a breach of such duty is not to be presumed; and where a breach of such duty is suggested, it lies upon those who seek to avail themselves of the objection, to prove the negative. Until the contrary therefore is shewn, the Court will presume here, that the money had actually been paid by the Exchequer to the Bank of *England*, who must be taken to have it in their hands. The burden of proof to the

contrary lies upon them, and not upon the person entitled to receive the money. Here the declaration does, however, contain an allegation, that the dividends were due and *payable*; and that is sufficient, because they could not be *payable*, unless they came to the plaintiffs' hands. [*Abbott, C. J.* That is, due and payable *by the government*; it does not say, due and payable by the *Bank*]. It is not contended that the Bank of *England*, became the immediate debtors of the public. Nobody contends that this is a private debt due from the bank to the particular individual who claims it; but the governor and company of the bank, being public functionaries, the Court will presume they were in a condition to perform the duty imposed upon them by the legislature. [*Abbott, C. J.* They are nothing but the agents of government]. This action is brought against them as agents of the government, for not paying money which they have received; and it is contended, that until the contrary is shewn, the Court must presume that it has got into their hands. [*Bayley, J.* That is a conclusion which ought to be drawn by the jury].

ABBOTT, C. J.—The Court can only give judgment upon the facts as they are found stated upon the record. The two counts upon which the writ of error is brought, represent it to have been the duty of the Bank of *England* to pay dividends to the plaintiff below, upon stock which once stood in his name in their books; but it could not be their duty to pay those dividends, until the governor and directors of the bank themselves had received them. There is no allegation in the declaration that the government had issued the money to pay these dividends, and there is no finding in the special verdict which will cure that defect. It appears to me, therefore, [without considering or deciding, that if there had been an averment of the payment of the money by the Exchequer, the defendant could retain his judgment], that this is a fatal objection. The ground of my present opinion is, the

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want of an allegation that the government had issued this money to the Bank of *England*, and there being nothing in the special verdict to supply the omission, for this reason our judgment is, that the second and fourth counts are not sustained.

BAYLEY, J.—Even if there were no other objection to the second count, and it had alleged simpliciter, that it was the duty of the bank to pay the dividends to the plaintiff below, it must have gone on to aver, that the bank had received the money from government. All that it alleges is, that the stock had not been legally transferred, and therefore, by reason of the premises, the defendants became and were liable, and it became and was their duty to pay to the plaintiff all the dividends, &c. Now there are no premises to warrant that conclusion, for the bank were under no obligation to pay the money until they had received it. The duty of the plaintiffs has not been truly described, and therefore there is nothing which they are called upon to answer. We are not at liberty to draw inferences which the facts expressly found do not warrant.

HOLROYD, J.—The objection to the second and fourth counts would be fatal on general demurrer.

LITLEDALE, J., concurred.


Judgment reversed.

FEARNLEY and others v. MORLEY.

A Turnpike
 Act imposed
 tolls, 1st, upon
 carriages

ASSUMPSIT, on the money counts. Plea, non assumpsit, and issue thereon. At the trial, before *Best, J.*, drawn by horses; second, upon horses not drawing; third, upon oxen, &c:—Provided, that all persons having paid toll once for their carriages, horses, and cattle, returning

at the *Huntingdonshire* summer assizes, 1822, the plaintiffs obtained a verdict for 77*l.* 16*s.* 9*d.*, and the defendant had liberty to move to enter a nonsuit. Upon that motion being made in the ensuing term, the Court directed the facts to be stated in the following case.

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The plaintiffs were the proprietors of the *Rockingham* public stage coach, travelling from *London* to *Leeds*, and from *Leeds* to *London*. The defendant was clerk to the trustees appointed under a local turnpike act, passed in the 38 Geo. 3; entitled, "An Act for repairing the roads from the stone pillar upon *Alconbury Hill*, to *Wansford Bridge*, and from *Norman Cross* to the south end of *Peterborough Bridge*, all in the county of *Huntingdon*." By that act, a toll of 1*s.* 6*d.* was imposed upon any coach, &c., drawn by more than two horses, passing through certain toll gates, continued, or to be erected, on the roads mentioned in the act; and certain other tolls were imposed upon horses not drawing, and upon cattle; and it was also provided that all and every person or persons having once paid the tolls so made payable as aforesaid, for his and their carriage, horses, and cattle, having occasion to return, and actually returning before twelve o'clock at night, next after having paid such toll, with the same carriage, horses, and cattle, should have liberty to pass toll free, through such gates as he had before paid toll at, and should not be obliged to pay toll a second time on one day. By an act of 59 Geo. 3, the said therein recited act of 38 Geo. 3, and all and every the clauses, powers, provisions, matters, and things therein contained, except such parts thereof as were thereby varied, altered, or repealed, were continued in full force and effect, to all intents and purposes, as if the

the same day, with the same carriages, horses, and cattle, should pass toll free. A subsequent act recited that it was expedient to increase the existing tolls, and re-enacted the provisions of the former act, subject to some alterations, one of which was, that the former tolls should cease, and that instead thereof, there should be paid a certain toll, for every horse drawing a carriage. Four horses passed a toll gate in the morning, drawing a carriage, and repassed the same gate in the evening, drawing a different carriage:—Held, that being the same horses, they are not liable to a second toll.

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same were repeated and re-enacted in the body of that act, but subject, nevertheless, to the alterations and amendments thereby made. By the 59 *Geo. 3*, all the tolls imposed by the 38 *Geo. 3*, were repealed, and instead thereof, as to the tolls on carriages, a toll of 6d. for every horse drawing a coach, &c., was imposed; and it was further enacted, that no person or persons should be liable to the payment of toll at more than two bars on the said roads, on passing between *Alconbury Hill* and *Wansford Bridge*, in any one day, from the 1st *January*, 1821, to the 7th *February*, 1822.

The *Rockingham* coach, going from *London* to *Leeds*, having changed horses at *Stilton*, passed through the *Wansford* toll gate at eight o'clock at night, when a toll of 2s., that is, of 6d. for each horse, was paid by the coachman. The same horses for which the toll had been paid, returned with the *Rockingham* coach, going from *Leeds* to *London*, being a different coach, with different passengers, and passed through the said gate at eleven o'clock, and got back to *Stilton* before twelve o'clock the same night. Upon reaching *Wansford* gate the second time, a second toll of 2s. was demanded by the collector appointed by the trustees, because, although the coachman and horses were the same, the coach and passengers were different. The gate being closed, and the coach prevented from proceeding, the coachman, protesting against the collector's right to exact it, paid such second toll, for the above-mentioned period of time. In the like manner the *Rockingham* coach going from *Leeds* to *London*, changed horses at *Stilton*, and passed through the *Sawtry* toll gate at one o'clock in the morning, when a toll of 2s. was paid. The same horses returned with the coach going from *London* to *Leeds*, being a different coach, with different passengers, at six o'clock in the same morning, when a second toll was demanded, and paid, under a similar protest, for the same period of time. The toll gates at *Wansford* and

Sawtry are both situated on the line of road between *Alconbury Hill*, and *Wansford Bridge*, and there are no other gates within the same distance.

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This case was argued at the sittings after *Easter* term, 1825, by *Dover* for the plaintiffs, and *Storks* for the defendant, when the Court took time for consideration. Judgment was now delivered by

BAYLEY, J. (a).—The plaintiffs in this case brought their action to recover back the amount of certain tolls paid by them, between *January* 1821, and *February* 1822, in respect of their coach called the *Rockingham*, which ran from *London* to *Leeds*, passing through two toll-gates, situate at *Sawtry* and at *Wansford*; and the question was, whether two tolls were payable on the same day at those gates, or only one. The same horses passed through the gates each time, driven by the same coachman, but drawing different coaches, with different passengers. Both the coaches belonged to the plaintiffs. It was contended that the plaintiffs were entitled to exemption the second time of passing, the horses being the same, though the coaches were different. The question depends upon two acts of parliament, the 38 *Geo.* 3, and the 59 *Geo.* 3. The 38 *Geo.* 3, imposes tolls, first, upon coaches, &c., drawn by more than two horses, 1s. 6d.; second, upon waggons, &c., according to the breadth of the wheels, and the number of horses, &c., by which they are drawn; third, upon horses, &c., not drawing; and lastly, upon oxen, &c., at the rate of so much per score. The exemption clause provides, that all persons having once paid toll for their carriages, horses, and cattle, having occasion to return, and actually returning before twelve o'clock at night of the same day, with the same carriages, horses, and cattle, shall pass toll free. The 59 *Geo.* 3, recites, that the money borrowed for the

(a) The arguments used, and the authorities cited by the counsel, are so fully gone into by the Court in their judgment, that it was thought superfluous to detail them in the report of the case.

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roads cannot be repaid, nor the roads kept in repair, except the term of the former act is prolonged, *the existing tolls increased*, and some of the provisions altered and enlarged; and it continues the provisions of the former act, with certain exceptions, in as full, ample, and beneficial a manner, as if they were re-enacted. One of the alterations is, that the former tolls shall cease, and that, instead thereof, there shall be paid for every horse, &c., drawing a coach, &c., 6*d.*; drawing a waggon, &c., 3*d.*; horse, &c., not drawing, 1½*d.*; score of oxen, &c., double the former toll; carriage fixed behind another, if with four wheels, 1*s.*, if with two wheels, 6*d.* This act contains a new exemption clause, but wholly inapplicable to the present case. The question, therefore, is, whether the exemption clause in the 38 Geo. 3, applying the language of that clause to the tolls imposed by the 59 Geo. 3, extends to this case, namely, that of the same horses drawing a different coach. According to the mode in which the tolls were payable under the 38 Geo. 3, that is, in respect of the carriage, not in respect of the horses drawing it, the new coach in this case, would, in conformity with the opinion of the Court in *Williams v. Sangar* (a), and *Waterhouse v. Keen* (b), be liable to the second toll: and according to the mode in which the toll is payable under 59 Geo. 3, that is, in respect of the horses drawing the carriage, not in respect of the carriage itself, the new coach in this case, would not, in conformity with the case of *Morris v. Poate* (c), be liable to the second toll, but would be exempt. The point for consideration, therefore, is, whether the existence of the liability, according to the mode in which the toll was payable under the 38 Geo. 3, will extend that liability to the mode in which the toll is payable under the 59 Geo. 3. If the toll had been payable under the 38 Geo. 3, in the same mode in which it is payable under the 59 Geo. 3, the exemption in question would certainly have existed. When the 59 Geo. 3, varies the

(a) 10 East, 66.

(b) Ante, vol. vi. 257. 4 B. & C. 200.

(c) 3 Bing. 41. 10 J. B. Moore.

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mode of imposing the toll, has it not the same effect, as if the substituted mode introduced into the 59 Geo. 3, had been inserted in the 38 Geo. 3, and that mode would have extended the exemption to the second toll. The variation in the mode was introduced into the 59 Geo. 3, either at the instance of the framer of the bill, or by the discretion of the legislature. If it was introduced by the former, the legislature has acceded to it. If it was insisted on by the legislature, the legislature has *required* it. In either case there is a sanctioned variation in the mode, and if the mode has been authoritatively varied, who can say that the consequences of that variation are not to follow? It may be a hardship upon those to whom the 38 Geo. 3, gave an exemption, that that exemption was not continued by the 59 Geo. 3. But they should have attended to the continuance of that exemption; they must have been aware, if they had paid proper attention to the subject, that the 38 Geo. 3, was near upon expiring, and that some new provision must be soon forthcoming, and then they might, and should, have used their endeavours to continue in the new act that mode of imposing the tolls, which afforded them an exemption under the old act. They either neglected to do so, or their endeavours were unsuccessful; but the result is, in either case, the same. The previous mode is not continued; a new mode is substituted: and does not the substitution of the new mode supersede with all its consequences the old? *Gray v. Shilling (a)*, is an authority in point to shew that it does; and without any authority upon the point, a variation in the mode necessarily implies a change in the intention. Had it been intended to continue the old system, the use of the old language, and the continuance of the old mode, would naturally have been expected. Where new language is introduced, and a new mode adopted, it must be supposed a new system was intended. We are, therefore, of opinion, that we must

(a) 1 J. B. Moore, 271. 2 B. & B. 80.

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construe the exemption clause in the 38 Geo. 3, with reference to the new mode of imposing the toll provided for by the 59 Geo. 3, as if that had been the mode originally prescribed by the 38 Geo. 3; and consequently, that the defendant wrongfully took the tolls in question. This opinion will produce an uniformity of decision, according to the language of each act, whether it applies to an act where there has previously been no turnpike, or to one where a turnpike with its tolls and toll regulations have previously existed.

Judgment for the plaintiffs.


JACKSON v. CURWEN.

A Turnpike Act imposed toll, first, upon every horse, &c., drawing any carriage; 2d, upon every horse, &c., not drawing; and 3rd, upon every score of oxen, &c.: provided that no collector should take from any person more than one toll for the same carriage, horses, beasts, or cattle, passing once, and repassing once in the same day, through the same, or

any of the gates on the roads, such person producing a ticket denoting that such toll had been paid on that day for such horses, beasts, or cattle. Where the same horses passed and repassed once in the same day, drawing different carriages belonging to the same person:—Held, that only one toll was payable.


CASE. The first count stated, that a certain toll-gate, situate in the county of *Cumberland*, standing upon and across a certain public highway in the said county, was a gate erected by virtue of a certain act passed in the 46 Geo. 3, entitled, “An Act for more effectually improving the roads leading to and from the port and town of *Whitehaven*, in the county of *Cumberland* ;” that plaintiff, after the passing of the act, to wit, on the 11th *April*, 1825, in the county aforesaid, was lawfully possessed of four horses, which then and there drew a certain coach of plaintiff in and along the said highway, and through the said toll-gate; that for the said horses so passing through the said toll-gate, plaintiff then and there paid to defendant, being the toll-gate keeper appointed to collect the tolls at the said gate, the toll by him demanded, and due in that behalf, by force of the statute aforesaid, and then and there

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obtained and received from defendant, so being such toll-gate keeper, a proper and sufficient ticket, denoting the due payment of such toll; that afterwards, and before twelve o'clock at night, of the same day, in the year last aforesaid, in the county aforesaid, the same horses were lawfully drawing another and different coach of plaintiff's, in and along the said highway, and near to the said toll-gate, for the purpose of passing through the same free of toll, and for that purpose plaintiff then and there presented and shewed to defendant the said ticket, and demanded permission of defendant, as such toll-gate-keeper as aforesaid, to pass through the said gate with the said horses and the said last-mentioned coach, free of toll, according to the form and effect of the statute aforesaid; yet defendant, well knowing the premises, but wrongfully and maliciously contriving to injure plaintiff in that respect, did not, nor would, permit the said horses with the said last mentioned coach, so to pass through the said toll-gate free of toll, but wholly refused so to do; and on the contrary thereof wrongfully and falsely pretended that a toll of a certain sum of money, that is to say, a toll of 2s., was due and payable to defendant, under and by virtue of the statute aforesaid, and injuriously fastened the said gate, and kept the same fastened for a long space of time, to wit, for the space of one hour, and thereby wrongfully stopped and detained the said horses and the said last-mentioned coach, and hindered and prevented the same passing through the said gate, along the said highway, until plaintiff paid to defendant the said sum of money, so pretended to be due and payable as aforesaid, contrary to the form and effect of the statute aforesaid. Second count in trover. Demurrer to the declaration, and joinder in demurrer (a).

(a) By s. 17 of the act, the following tolls were imposed:—"For every horse, &c., drawing any coach, &c., sixpence. For every horse, &c., not drawing, twopence. For every score of oxen, &c., one shilling and sixpence per score, and so in proportion for any greater or less

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This case was argued by *F. Pollock*, for the plaintiff, and *Patteson*, for the defendant.

Judgment was now delivered by

BAYLEY, J.—It is an established rule, that where the toll is imposed upon carriages drawn by horses, and there is a clause of exemption for persons repassing on the same day, with the same horses *and* carriage, or with the same horses *or* carriage, and the same carriage returns the same day drawn by different horses, no second toll is payable; *Williams v. Sangar* (a); *Waterhouse v. Keen* (b). And where the toll is imposed upon horses drawing a carriage with a similar clause of exemption, no second toll is payable, if the same horses return with a different carriage: *Gray v. Shilling* (c). In this case a toll of sixpence is imposed upon horses drawing; and a toll of two-pence upon horses not drawing: and therefore, according to the above rule, in an ordinary case, no second toll would be payable in respect of the same horses repassing with a different carriage. Unless, therefore, it appears clearly from the exempting clause in the act of parliament now under con-

number; and for every drove of calves, &c., tenpence per score, and so in proportion for any greater or less number."

By s. 21 it was enacted, "That nothing therein contained should be construed to enable any collector of the said tolls to demand or take any more than one toll, from any person, for or in respect of the same carriage, horses, beast, or other cattle, passing once, and repassing once, in the same day, such day to be computed from twelve o'clock at night to twelve o'clock in the succeeding night, through the same, or any other gate or gates, on any of the said roads, all and every such person and persons producing a ticket, denoting that such toll had been paid on that day, for and in respect of such horse, &c., on the said roads."

By s. 28 it was enacted, "That it should be lawful for the trustees, from time to time, to compound with any person or persons, for any period of time not exceeding one year, for any horses, &c., passing on the said roads, or any parts thereof, for all or any of the tolls to be paid in respect of such horses, &c."

(a) 10 East, 66.


(b) Ante, vol. vi., 257; 4 B. & C. 200.

(c) 4 J. B. Moore, 371. 2 B. & B. 30.

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sideration, to have been the intention of the legislature that it should apply to those cases only where the same horses repassed drawing the same carriage, the general rule of construction applicable to these acts of parliament ought to prevail, and then no second toll would be payable in the present case. The word "carriage" first appears as the subject of toll in the exemption clause, which enacts, that no collector shall take more than one toll for the same carriage, horses, beasts, or other cattle, passing once, and repassing once, in the same day. From that part of the clause, taken by itself, it would appear to have been the intention of the legislature, that the exemption should apply to those cases only, where the same horses repassed, drawing the same carriage. The carriage, therefore, is contemplated as the subject of toll. But, the clause goes on to annex, as a condition precedent to any exemption, that the party claiming it shall produce a ticket, denoting that the toll has been paid on that day for such horses, beasts, or other cattle: so that the ticket which is to be shewn to the collector in order to exempt a party from the payment of a second toll, is to denote only that the toll has been paid for the horses, and not for the carriage. Still, if the former part of the clause is to be construed literally, the production of the ticket will not exempt a party from toll, unless he repasses with the same horses drawing the same carriage. From the latter part of the clause, it appears that the legislature contemplated a toll upon horses only; from the former, that they contemplated a toll upon carriages. Taking the whole together, it seems very doubtful, whether it was intended to be confined to cases where the same horses repassed drawing the same carriage, or not. There is, however, one other clause, which shews that horses, and not carriages, were the intended subject of toll, namely, sec. 28, which enables the trustees to compound with any person for any horses, beasts, or cattle, passing on the roads, for any tolls payable for the same. Considering, therefore,

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that the toll was originally imposed upon horses drawing, and not upon carriages drawn ; and that it is by no means clear that that the exemption clause was intended to be confined to these cases only where the same horses repassed drawing the same carriage ; we think the general rule of construction applicable to these acts of parliament ought to prevail, and consequently that no second toll was payable for the same horses repassing the same day drawing a different carriage, the property of the same person. As, however, it does not sufficiently appear upon the face of this declaration, that the plaintiff passed and repassed only once, we think the defendant is entitled to judgment ; but, under the circumstances, we deem it proper that the plaintiff should be allowed to amend upon payment of costs.

Judgment accordingly.

CHAMBERS and others v. WILLIAMS (a).

A Turnpike Act imposed tolls, 1st, on horses drawing carriages ; 2nd, on carriages fixed to waggons ; 3rd, on horses not drawing ; and 4th, on oxen, &c. : Provided that every person having paid the toll, on producing a ticket denoting such payment,

ASSUMPSIT for money had and received. At the trial the plaintiffs obtained a verdict, damages 13*l.* 16*s.*, subject to the opinion of this Court upon the following case.

The plaintiffs were the proprietors of two stage coaches, one of which travelled daily between *Birmingham* and *Liverpool*, and the other travelled daily between *Liverpool* and *Birmingham*. The defendant was clerk to the trustees under a turnpike road act. By that act the trustees were authorised to take at the toll-gates or toll-bars erected by

(a) This case was decided at the sittings before *Easter* term, 1826 ; but from its similarity to the two preceding cases, it was thought convenient to insert it here.

should be permitted to pass and repass, once in the same day, through the gates mentioned in such ticket, with the same horses, or other beasts, coach, or other carriages, without being liable to any additional toll. Where the same horses passed and repassed once in the same day, drawing different carriages belonging to the same person :—Held, that only one toll was payable.

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virtue of the act, on every day, the following tolls:—"For every horse, mule, or other beast, drawing any coach, sociable, berlin, or other such like carriage, sixpence; for every horse, mule, or other beast drawing any waggon, wain, cart, dray, or other such like carriage, sixpence; for every *four-wheeled carriage* fixed to any waggon, wain, dray, cart, or other carriage, ninepence; for every *two-wheeled carriage* so fixed, sixpence; for every horse, or mule, drawing any other carriage, of whatever name or description, sixpence; for every ox, steer, gale, or bull, drawing any carriage, of whatever name or description, fourpence: for every ass drawing any carriage, of whatever name or description, twopence; for every horse, mule, or ass, laden, or unladen, and not drawing, one penny; for every drove of oxen, cows, or neat cattle, tenpence per score; and so in proportion for any greater or less number; and for every drove of calves, hogs, sheep, or lambs, fivepence per score, and so in proportion for any greater or less number." The said respective tolls were, subject to the restrictions in that act contained, to be demanded and taken before any horse, mule, or other beast, coach, waggon, cart, or other carriage, or drove of oxen, or neat cattle, calves, sheep, lambs, or swine, should be permitted to pass through any toll-gate erected, or to be erected, or continued upon the said road by virtue of that act; and upon payment of any of the said tolls, the collector or receiver, was required to deliver gratis to the person paying such toll, a note, or ticket, denoting such payment, on which note or ticket should be named and specified the several toll-gates freed by such payment. By s. 28, it was enacted, that any person having paid the said tolls, on producing a ticket from the collector, denoting such payment, should be permitted to pass and repass once in the same day, through the toll-gates mentioned in such ticket, with the same horses, mules, or other beasts, *coach*, waggon, cart, or other *carriage*, or drove of oxen, or neat cattle, calves, sheep, lambs, or swine, without being sub-

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ject or liable to any additional toll for so doing ; and that no person should be permitted to pass a subsequent time in any one day, with the same cattle, through any of the toll-gates aforesaid, until he should pay, for every such subsequent time of passing through such toll-gates the same day, the tolls by that act authorised to be taken. Four of the plaintiff's horses, drawing one of the said stage coaches in its way from *Birmingham* to *Liverpool*, conveying passengers and parcels for hire, driven by the plaintiff's coachman, passed about three o'clock in the afternoon of every day through one of the toll-gates erected by virtue of the act ; and about nine o'clock in the evening of every same day, the same four horses, driven by the same coachman, repassed through the same gate, drawing the other of the said stage coaches in its way from *Liverpool* to *Birmingham*, conveying other passengers and parcels for hire. The collector at the said gate demanded a second toll of sixpence for each of the said four horses upon their repassing through such gate ; which demand the plaintiffs have resisted, but have been compelled to pay, and have accordingly paid the money so demanded by the collector at the said gate, amounting to 13*l.* 16*s.*, after protesting against the same.

This case was argued by *Cross*, Serjt., for the plaintiffs, and *Cottingham*, for the defendant.

BAYLEY, J.—The act of parliament in this case imposes the toll universally upon horses drawing carriages, except only where a carriage is fixed to a waggon. It imposes different tolls upon horses drawing different descriptions of carriages, and it contains one general exempting clause, applicable to all the cases comprised in the enacting clause. There is a great want of precision in the exempting clause ; but as the toll in this case must be payable, if payable at all, in respect of horses drawing, I think the general rule of construction applicable to these acts of parliaments ought to prevail, and consequently,

that no second toll is payable for the same horses repassing with a different carriage. If the framers of the act intended that a second toll should be payable in such cases, they should have taken care to have expressed that intention in plain and unambiguous language. Looking at the exempting clause alone, it certainly appears that the legislature contemplated a toll upon carriages, and not upon horses; but the toll imposed, is, with the exception I have mentioned, in fact a toll upon horses: and the exempting clause must be construed together with the enacting clause. Construing both clauses together, and adverting to the rule of construction which has been applied to similar acts of parliament, where the toll has been imposed upon horses drawing, and where there has been a general clause of exemption applicable both to horses and carriages; I think it extremely doubtful, whether the legislature intended to impose a second toll upon horses repassing the same day with a different carriage: and that being so, we are bound to lean to that construction which will have the effect of relieving the public from a burthen. *Loaring v. Stone (a)*, is distinguishable from the present case, because there the word "carriage" must have been wholly rejected from the clause, unless a second toll was payable: but here a toll is, in certain cases, imposed upon carriages, and the word "carriage" in the exempting clause may operate as applicable to those cases.

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HOLROYD, J., and LITLEDALE, J., concurred.

Judgment for the plaintiffs.

(a) Ante, vol. iii., 797. 2 B. & C. 515.

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BELL v. SMITH and others. (In error).

A., *B.*, *C.*, and *D.*, employ a broker to effect a policy of insurance on goods on board a certain vessel, and upon a loss happening, an action was brought in the brokers' name against the underwriters. *A.*'s evidence being necessary to the maintenance of the action, he, in order to render himself competent, executes a release to the broker, for a nominal consideration, of all liability to him for the money to be recovered in the action; and after action brought, he conveys all his interest in the policy to *L.*, and *R.*, for a nominal consideration, having, with his co-assured, previously executed a bond of indemnity to the broker for the costs of the action:—Held, on error, that *A.* was still liable for costs to the attorney who brought the action, and was therefore an incompetent witness.

Seemle, that the machinery resorted to for the purpose of making *A.* a competent witness, amounted to maintenance.

THIS was an action on a policy of insurance, for a total loss upon goods, on board the ship *Friendship*, lost by perils of the sea. Interest averred to be solely in persons named *Arnet*, *Gibb*, *Robertson*, and *Wimble*. Plea, the general issue. At the trial before *Burrough*, J., at the sittings in *London*, after *Trinity* term, 1824, the plaintiffs in the action below, after the usual proof, adduced evidence to shew, that *Arnet*, *Gibb*, *Robertson*, and *Wimble*, at the time of subscribing the policy, and from thence and until the time of the loss averred, were interested in the goods assured, and that the policy was effected thereon to and for their use and benefit, and on their account. The plaintiffs then tendered *Arnet*, one of the parties above-named, for examination as a witness. It being objected that he was incompetent, on the ground of interest, the plaintiffs produced a deed-poll, which had been executed by *Arnet* before the commencement of the action, whereby he released to the plaintiffs "all actions, claims, &c., which he had, or might have, against them, by reason of the said policy of insurance, or for, or on account of any monies to be recovered by them from the underwriters." The plaintiffs also gave in evidence an indenture dated 11th *June*, 1822, [which was executed after the commencement of the action], and made between *Arnet*, *Gibb*, *Robertson*, and *Wimble*, of the first part; the plaintiffs of the second part; and *Lachlan* and *Robertson* of the third part: whereby, [after reciting that the plaintiffs had effected the policy in question, and that *Arnet*, *Gibb*, *Robertson*, and *Wimble* were the persons interested in it; that actions had been commenced in the names of the plain-

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tiffs ; that *Arnet* had executed the deed-poll before mentioned ; that the plaintiffs being desirous of an indemnity against the costs of the actions, the court of *Common Pleas* had ordered *Arnet*, *Gibb*, *Robertson* and *Wimble* to indemnify the plaintiffs, they giving up all claim upon the assured for such costs ; and that *Lachlan* and *Robertson* had agreed to enter into the covenants thereafter contained, and the plaintiffs had agreed to accept such indemnity, and release the assured of all claim on account of such costs], it was witnessed, “ that in consideration of the assignment thereafter made by the assured, and of 10s. paid by the plaintiff, they, *Lachlan* and *Robertson*, covenanted to indemnify the plaintiffs against all costs of the said actions ; and further, that in consideration of 10s. paid by the assured to the plaintiffs, they released the assured from all claims on account of such costs ; and the assured, in consideration of 10s., did assign to *Lachlan* and *Robertson* all their right, title, and interest, of, in, to, and under the said policy of assurance, and all benefit to be derived therefrom, for their own proper use and benefit ; and that all monies to be recovered in the said actions should be received for, and on account of *Lachlan* and *Robertson*, and for their own exclusive use and benefit.” Upon the production of these instruments, *Arnet* was examined on the voir dire, and he stated, that at the time of the voyage mentioned in the declaration, he was interested in the ship and goods ; that the accounts of the concern had not been settled, and were still open, but that he did not know of any debts outstanding from the concern ; that the plaintiffs were agents for him and the other part-owners in effecting the policy, and that it was effected on their account. The objection to *Arnet*’s competency being overruled by the learned Judge, he was admitted and examined as a witness for the plaintiffs. The jury found their verdict for the plaintiffs ; whereupon the defendants below tendered a bill of exceptions, which being sealed by the learned Judge, the record was removed into this Court by

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writ of error, and the question was, whether *Arnet* was a competent witness on the trial below.

Campbell, for the plaintiff in error. It is submitted, that *Arnet* was an incompetent witness, on three grounds,—1st, He was substantially a party on the record;—2nd, he had a direct interest in the event of the suit;—and, 3rd, the verdict, if obtained for the plaintiffs, might be given in evidence at any future time, either for or against him. If all, or any of these propositions can be made out, the plaintiffs in error will be entitled to a venire de novo. First, *Arnet* was substantially a party on the record. He was one of the assured, and the policy was effected for his benefit, and that of the other parties interested with him. Although principals may not be disclosed at the time of entering into a contract of this nature, yet they may at any time disclose themselves, and assert their rights. Here the policy was effected by the defendants in error, as agents for *Arnet* and the other persons jointly interested with him. The brokers had no interest in the contract, and therefore it was competent for *Arnet* to disclose himself as a principal; and it is clear, that in such a case, if an action had been brought in the names of himself and his co-assured, the brokers might have been called as witnesses in support of the action. The cases of *Bell v. Ansley* (a), and *Smith v. Lyon* (b), establish, that where a person is substantially the plaintiff on the record, and the person for whose benefit the action is brought, and is himself the contracting party, he is to be treated as the real plaintiff. Now here, *Arnet* is one of the contracting parties, and it is for his benefit, as well as that of his co-assured, that the action is brought; therefore he is, virtually, one of the parties to the record. This action is brought in the names of the brokers, because the policy was effected in their names; but that makes no difference, if it appears, as here, that *Arnet* was one of the persons

(a) 16 East, 141.

(b) 3 Campb. 465.

directly interested ; and consequently, he cannot be called as a witness. It is upon this principle, that the lessor of the plaintiff in ejectment is treated as a real plaintiff, and for that reason cannot be called as a witness for the defendant ; and for the like reason he cannot be permitted to give evidence for the plaintiff, *Fenn v. Granger* (a). There it was held, that in ejectment on the several demises of two persons, although the evidence shews the title to be exclusively in one of them, the other cannot be compelled to be examined as a witness for the defendant. Then, secondly, *Arnet* had a direct interest in the event of the suit, because, if by means of his evidence his co-assured recovered a verdict, the fruits of that verdict would be applicable in discharge of the debts of the concern, and he would thereby be released from liability to contribution. Probably the assignment to *Lachlan* and *Robertson* will be relied upon, on the other side, as shewing that he can have no interest in the result of the suit ; but as the assignment was executed whilst the action was depending, it can have no operation in the present case ; and assuming it to be a valid assignment on the face of it, still *Lachlan* and *Robertson* would be accountable, in equity, to *Arnet*, for any surplus in their hands after discharging all the liabilities of the concern. He has, therefore, still an interest, notwithstanding the assignment. To make the assignment available at all, *Arnet* should have executed a release of all surplus funds. But independently of this, he has still an interest in the result of the suit, as respects his liability for costs ; for if the brokers in whose names the action is brought, should be unable to pay the costs, the attorney employed would have a right to maintain an action against the assured, they being the persons for whose benefit the original action was brought. For instance, if an attorney is employed to bring an action in one man's name, and that person is unable to pay the costs, the attorney would have his remedy against the person really interested.

(a) 3 Camp. 177.

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[*Abbot*, C. J. Have you any instance to that effect?] There is no decided case upon the point, but upon principle it would seem clear, that the attorney originally employed, would have his remedy against *Arnet*, and his co-assured, for the costs of the action. (Upon the third point, the Court told *Campbell* he might reserve his argument, intimating that they would hear the other side upon the first two points).

Parke, contrà. First, it is submitted upon this bill of exceptions, that *Arnet* cannot be treated as substantially a party on the record; and second, that it does not appear that he has such an interest in the event of the suit, as will prevent him from being a witness. It is not disputed that the lessor of the plaintiff in an action of ejectment is an incompetent witness, but the express ground of objection to his competency is, that he is the real plaintiff on the record. But an action on a policy of insurance differs materially from an action of ejectment, because, although a party may be named in a policy, yet he may have no interest in the subject insured. The object of introducing the names of the apparent assured into the declaration, was to shew that this was not a wager policy, but a matter of ordinary occurrence. It does not therefore follow, because the name of *Arnet* is introduced as one of the persons in whose names the policy was effected, that he is a party to the record. Suppose the case of goods insured and sold together with the policy, it would be necessary for the party really interested in such case, in declaring upon the policy, to set out the names of the persons by whom the policy was effected. In such case, could it be contended that the parties so named, would have such an interest as plaintiffs on the record, as to render them incompetent witnesses? The question here is, whether at the time of giving his evidence, *Arnet* had any interest in the suit; for it has been decided, after much consideration, in *Norden v. Williamson* (a), that the mere circumstance

(a) 1 Taunt. 378.

of a person being a party to the record, does not of itself render him an incompetent witness, unless he is examined in support of his own interest. If, therefore, it can be established that *Arnet* had no personal interest at the time of his examination, he was a perfectly competent witness, even assuming him to be a party on the record. Then had he any interest at the time he came to be examined? It is clear that he had not; for by executing the deed-poll, he had divested himself of all interest in the beneficial result of the action. In what situation did he stand, after executing the deed-poll? He released the plaintiffs of all claim upon the fruits of the action; and that would prevent him from reaping any benefit, either at law or in equity, from the damages which would be recovered. But then it is said, that he has an indirect interest, because, if the plaintiffs should recover, he will be benefited by the discharge of partnership debts, to which he would be otherwise liable, the partnership accounts being unsettled. But that is not the effect of the deed-poll, because, according to the plain import of that instrument, it is *Arnet's* interest that the verdict should be found for the defendants, rather than the plaintiffs; for if in the result the verdict should be adverse to the plaintiffs, he would be liable in equity to make good the share which he had released to his co-assured. It is only in the event of the plaintiff succeeding, that he could be at all benefited in the way suggested; but upon the examination of *Arnet* on the voir dire, it appeared there were no outstanding debts to which the fruits of the action would be applicable. In order to shew that *Arnet* was incompetent, it must be established, that he had a direct interest at the time of his examination. This cannot be left to mere surmise or inference, but must be matter of direct proof. The release completely does away with all direct interest which he might have had; and as to any indirect interest, that does not affect his competency, but only goes to his credit. [*Bayley, J.* Another view in which this point may be

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considered, is this:—Here is a man who has a policy of insurance, on which he knows he cannot recover in his own name, and cannot recover at all, unless he himself becomes a witness. He, therefore, sells his interest in the policy to somebody else, and gets a price for it, which he could not otherwise obtain, and then tenders his evidence in order to enforce the policy. Is not that something like champerty?] As to *Arnet's* liability for costs, that must depend entirely upon the question, who retained the attorney. Now, looking at the bill of exceptions, there does not appear to have been a word asked upon the voir dire, as to his liability to costs, or by whose direction this action was brought. This objection, therefore, has no foundation, and the Court cannot surmise a difficulty where none is founded on fact. As to the point suggested by the Court, supposing a person has a right to assign over a right of action to somebody else, there may be a question, whether that is maintenance or not; but that question does not arise in the present case, the only point being, whether *Arnet* was an incompetent witness at the time of the trial. The contrivance alluded to by the Court (though it may be punishable), does not go to his competency, but simply to his credit as a witness. Whatever suspicion may be excited as to the conduct of this transaction, the Court can only look to the legal effect of it; and if the legal effect be to remove all immediate interest, then *Arnet* was a competent witness.

Campbell, in reply, was stopped by the Court.

ABBOTT, C. J.—I am of opinion that *Arnet* was not, in the present case, a competent witness. There is no doubt that he was originally the substantial plaintiff to the suit, although not so in name; and we are not to be very astute to give effect to that, which makes the real plaintiff a witness. The action being brought for his benefit, and that of the other persons interested in the goods, although in

the names of the brokers who had effected the policy, it must, until the contrary be shewn, be presumed that the action is brought by him, and by his authority; for we are not to assume that it was brought by the authority of persons having no interest, rather than by the authority of those who were directly interested. Now, if the action was brought by him, or under his authority, whether expressly or impliedly given to the attorney, nothing that has been done in this case can deprive the attorney who brought the action, of his right to recover the costs against *Arnet*, as well as the other persons interested. The machinery, notwithstanding the contrivances resorted to, has left that objection open to his competency. Upon that ground alone, without adverting to any others, we are warranted in saying, that *Arnet* had such a direct interest in taking care that the verdict should pass for the plaintiffs, that he was an incompetent witness upon the trial of this cause. I am therefore of opinion, that a venire de novo must be awarded.

BAYLEY, J.—I am entirely of the same opinion. In this case the nominal plaintiffs on the record, effected the policy of insurance in the character of agents. They had no interest of their own, and the suit was not originally brought to enforce any right which they possessed. The persons substantially interested, are *Arnet* and others, and I think there is abundant proof to shew that the action was originally commenced, not at the instance of the nominal plaintiffs, but of those persons who were substantially interested in the subject of insurance. It appears from the documents under the hand of *Arnet*, and the other parties jointly interested with him, that the names of the plaintiffs had been merely used in the action. That would shew, that they had been used, not for their benefit, but for the benefit of those who were really interested. It appears, also, that the nominal plaintiffs made an application to the Common Pleas, in order that they might be

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indemnified against the costs of the action, and accordingly that Court made an order in the cause, that the assured should indemnify them. It seems to me, therefore, to be very plain, that the action was not brought by the plaintiffs in whose name it was commenced, but substantially by the assured. Now, as it was brought by the assured, in what situation, in the first place, would the attorney be? If an order is given by any one of these parties, they being all jointly interested, that one having right to use the names of all, the attorney would be justified in considering himself as acting upon the general security of all, unless there is some special bargain made to the contrary upon the subject; and in the absence of such a bargain, we are not at liberty to assume that it took place. It appears to me, therefore, that on that ground, *Arnet* has such a direct interest in discharging his own liability for costs, as to render him an incompetent witness. But I think it is impossible to consider him as a competent witness, for a much stronger reason. The action was originally brought at the instance of *Arnet*, and his co-assured. It is then found that there is not sufficient evidence to support the action, and thereupon the parties resort to a description of machinery which militates against the doctrine of the assignment of choses in action, and which is calculated to produce all the mischiefs which the doctrine of maintenance and champerty is calculated to produce. The first thing done is, that, without consideration, as far as we can see, *Arnet* releases the nominal plaintiffs of all his interest in the policy of insurance which is the subject of the action. Is that found sufficient? Finding that it is not, and feeling that the action could not be maintained, unless he could be considered in the light of a disinterested person unconnected with the transaction, the expedient is then resorted to, of conveying to *Lachlan* and *Robertson*, all his interest in the policy, for the valuable consideration of 10s. Now, if a case of maintenance or champerty were put, can a stronger one than this be sug-

gested? Here is an action brought by several persons originally interested, and as it cannot be sustained for want of evidence, one of those persons, who would be considered as an interested witness in the first place, releases all his claim to the persons who are the nominal plaintiffs, and afterwards assigns his interest to his co-partners, for a mere nominal consideration. Upon what principle is the doctrine of maintenance considered as illegal? Because, as laid down in all the books, it encourages suits, and induces parties to go on with actions which could not otherwise have been supported. Now this was the very object of the machinery in question, for these deeds amount to an acknowledgment, that without the testimony of *Arnet*, the action could not be maintained; and it is impossible for any person to shut his eyes against the conviction, that this scheme was merely the result of machinery and contrivance. On these grounds it appears to me, that it would work great mischief, if we were to hold that *Arnet* is a competent witness. Mr. *Parke* says, "let these parties be punished, if this be the result of machinery and contrivance;" but it seems to me, that one mode of punishment is to say, that a verdict obtained by such means, shall not be of any avail. I am of opinion, therefore, that *Arnet* ought not to have been received as a witness.

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HOLROYD, J.—I am of the same opinion. The express object of the assignments certainly was to support the action by means which were clearly unlawful. It appears to me, that *Arnet*, and his co-assured, were really parties to the action, and this is to be collected from the face of the record itself. Being, therefore, really a party to the action, he was originally incompetent, on the general principle of law, that no person shall be a witness in his own cause; and I am of opinion, that he could not get rid of that incompetency by the means resorted to. The declaration states the action to be brought on a policy of insurance, made by the nominal plaintiffs, as agents; and that

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Arnet, and his co-assured, were at the time of making the policy, and thence until, and at the time of the loss, interested in the goods; and that the policy was made to and for their use and benefit, and on their account. It likewise states, that the loss of the property for which the action is brought, was a total loss to them. On the face of this declaration, therefore, *Arnet*, and his co-partners, were the parties really interested, and the plaintiffs are only nominal persons. Without any thing more, the record itself shews, that the nominal plaintiffs would have to pay over the damages recovered to the assured, and as *Arnet* is one of the persons interested, he is *prima facie* an incompetent witness. But even if this were not so, it appears that the action was afterwards adopted by *Arnet* and his co-partners, because upon the application of the nominal plaintiffs to C. P. to be indemnified, he and his co-partners actually gave the plaintiffs an indemnity. By doing so, he adopted the action, and became liable to the attorney for the costs of what had been done through the medium of his agents. The attorney is an officer of the Court, and upon the general principle of law, *Arnet*, and his co-assured, would be responsible to him for the costs. It is true, that without a special authority, or a special credit pledged, they might not otherwise be liable; but it is for them to shew, where it appears that they were the principals, and had adopted the action, that they would not be responsible. I am, therefore, of opinion, that as *Arnet* was at all events liable to the claim of the attorney for costs, he was an incompetent witness.

LITLEDALE, J.—I am also of the same opinion. With respect to the case of a lessor of the plaintiff in ejectment, it is clear, that if a verdict went against him, he would be liable to costs at the instance of the defendant; and though I do not go the length of saying, that *Arnet* is to be considered as actually a party to the record, yet he was so in effect, and stood in the same situation as to liability for

costs, as if he actually were so, and on that ground would be an incompetent witness. It appears by the recitals in the indentures, that the policy of insurance was effected in the names of the plaintiffs, as agents for *Arnet*, and his co-assured, and therefore, as the action is brought for the benefit of the latter, it is manifest that they have a direct interest in the result, though the action, in point of form, is brought in the name of the brokers. Perhaps the examination of *Arnet* on the voir dire, did not go far enough in ascertaining whether he was or was not liable for costs; but I am clearly of opinion, that these deeds do not discharge his liability to the attorney for costs; and as he had an interest to that extent, he certainly was not a competent witness.

Venire de novo awarded.


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THIS was a rule nisi for a mandamus to the Justices of *Surrey* assembled in quarter sessions, commanding them to confirm an order made at a special sessions, under the authority of 55 *Geo.* 3, c. 68, s. 2, for diverting and turning a certain part of a public footway, called *the Bishop's Walk*, situate in the parish of *Lambeth*, in the county of *Surrey*. On moving to confirm the order of special sessions (against which there was no appeal), it appeared that the notice of holding the special sessions had been served upon the justices of the district, by the magistrate's clerk, and not by the high constable; whereupon the quarter sessions refused to confirm the order, being of opinion that the notices should have been served by the high constable. The question, upon reference to the 13 *Geo.* 3, c. 78, s. 62, and 55 *Geo.* 3, c. 68, s. 2, was who was the proper officer by whom the notices of holding the special session for diverting the way ought to be served.

Where the notice of holding a special session for making an order to divert a public footway, under 55 *Geo.* 3, c. 68, s. 2, was served on the justices of the district by the magistrates' clerk, and not by the high-constable: —Held, that the proceeding was irregular.

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Nolan and Barnewall, shewed cause against the rule. The proper officer to serve the notice of holding the special session is the high constable, in this instance. By 55 Geo. 3, c. 68, s. 2, the order for diverting a public footway or bridleway, is to be made at a special session convened for that purpose. The question then is, how the special session is to be convened. With a view to this question, recourse must be had to the General Highway Act, 13 Geo. 3, c. 78, s. 61; for in *Rex v. Justices of Worcestershire (a)*, it was held, that that statute was applicable to proceedings, by order of two justices, under 55 Geo. 3, c. 68, s. 2. Now by s. 61, it is declared to be lawful "for any two or more justices of the peace, within their respective limits, and they are hereby empowered from time to time, whenever they shall judge proper, to hold any special sessions, besides that which is hereinbefore directed, for executing the purposes of this act; and to adjourn the same from time to time, as they shall think fit, causing notice to be given of the time and place of holding such special sessions, and of the adjournments thereof, to the several justices acting and residing within such limits, *by the high constable, or other proper officer within the same.*" Upon the reasonable construction of these words, the high constable is the proper officer to serve the notice, in counties, and "other proper officer," must mean, any officer of the like kind, in cities, boroughs, or other local jurisdictions, where the Highway Act has operation. The magistrates' clerk, who is chosen by the magistrates themselves, and is removeable at pleasure, cannot be the proper officer contemplated by the legislature; for if he had been contemplated, he would have been expressly mentioned. The high constable is a public and responsible officer, and known to the law; but not so the magistrates' clerk, who is merely the private assistant of the magistrates, and no way responsible to the public for his acts or omissions. In this view of the case, the quar-

(a) 2 B. & A. 228.

ter sessions did right in refusing to confirm the order in question.

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Scarlett, Courthope, and Thesiger, in support of the rule. It is submitted that the statute was substantially complied with, by the manner in which the notices in question were served in this instance. The object of serving the notices at all, is merely that the justices of the district shall be fully apprised, that the special sessions are to be holden at the time and place stated in the notice. It matters little, by whom, in fact, the notice is given; and, perhaps, in a case of this nature, the most eligible person is the justices' clerk, who must be well known to all the magistrates of the district. The mode of giving the notice, therefore, is matter of form, and so long as the substance of the act is complied with, that is sufficient. The statute is directory, and not obligatory; and, therefore, so long as the justices of the district have had notice, the statute is substantially complied with. In the case of *Rex v. Justices of Worcestershire*, the decision went entirely upon the reasonableness of the notice in point of time, and not as to the manner in which it was served; and, therefore, the objection in this case derives no authority from that case.

ABBOTT, C. J.—Under the 13 Geo. 3, c. 78, justices of corporations have authority to act within their jurisdictions, as well as justices of counties, within the hundred. That being so, it seems to me, that the words "other proper officer," in s. 61, on which this question arises, will properly mean such officers in towns corporate, as discharge similar duties to those of the high constable of the hundred. That being the meaning of the words, then the proper person to give the notice in the county at large, is the high constable of the hundred; and the proper person to give the notice in a town corporate, is the officer of the corporation, who is in the habit of giving notices to the justices. Considering that to be the meaning of the

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words, and as the notice in this case was not given by the high constable, I am of opinion, that this was an imperfect notice; and that the special sessions were not properly convened. I do not think it is merely to be regarded as a matter of form, or of small importance, by whom the notice is to be given. It is obvious, that the legislature had it in view, to afford an opportunity to all the justices acting within the limits of the division, of being present at the special sessions, at which the order is to be made. That is clearly the object of this act. The 55 Geo. 3, goes even farther, for that requires notice to be given to the neighbourhood in which the road intended to be stopped up is situated. Certainly, the object of the latter act is different from the former, because there is a difference between giving notice to the justices, who are to make the order, and the general notice to the neighbourhood, of the proceedings which are intended to be had under the act, in order that publicity may be given to those proceedings. An observance, however, of the requisites of 13 Geo. 3, c. 78, s. 61, is not the less necessary, for the reason which I have pointed out. But there is another reason for requiring that the duty of serving the notice, should be performed by the high constable, rather than by the clerk of the magistrates, or any person of that description. If the justices require the high constable to give the notice, and he forbears to do so, he will be guilty of a neglect of public duty, and may be punished for it; but I should have very great difficulty in saying, that the person who is to act from time to time, as clerk to the justices at their petty special sessions, would be punishable for a breach of duty, if he forebore to serve the notices upon being required so to do. Of course, if he neglected his duty, he would be liable to be dismissed from his office; but it does not follow, that he would therefore be liable to punishment in the same manner as the high constable for a breach of his duty. Upon the whole, for these reasons, it seems to me, that the notice of holding the

special sessions ought to have been given by the high constable; and not having been so given, the whole proceeding was irregular. I am, therefore, of opinion, that the quarter sessions did right in refusing to confirm the order, and consequently the rule for a mandamus must be discharged.

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BAYLEY, J.—I am of the same opinion. I think the notice in this case was not conformable to the provisions of the act. The justices are bound to give that description of notice of holding the special sessions, which is pointed out by the 61st section; namely, by causing it to be given by the high-constable, or other proper officer. I cannot understand these words as being *directory* only. When the legislature has said, that the notice is to be given by the high-constable, or other proper officer, I cannot think that a notice would be sufficient when given by a person who is neither a high-constable, nor an officer known to the law.

HOLROYD, J., and LITLEDALE, J., concurred.

Rule discharged, with costs.

The KING v. BRODERIP, Esq.

ON shewing cause against a rule nisi, for a mandamus to the defendant (a justice of *Surrey*), commanding him to issue his warrant against one *William Kinder*, convicted by two of the overseers and rulers of the Watermen's Company, of carrying more passengers in a wherry, on the river *Thames*, than is by law allowed; the questions were, first, whether it was imperative on the justice to enforce a conviction which had not been made on the oath of the rulers of the Watermen's Company of *London*, have jurisdiction to convict an offender against the 34 Geo. 3, c. 65.

If a justice of the peace entertains a reasonable doubt of his jurisdiction, the Court will not compel him to do an act which may subject him to an action.

Quære, whether the rulers of the Watermen's Company of *London*, have jurisdiction to convict an offender against the 34 Geo. 3, c. 65.

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witnesses examined ; and second, whether the offence came within the jurisdiction of the Watermen's Company.

Copley, A. G., and Maule, shewed cause. This is not a case in which the Court will grant a mandamus. The defendant *Kinder* had been convicted in the penalty of 5*l.*, before two of the overseers and rulers of the society or company of Watermen, Wherry-men, and Lightermen, using, occupying, or exercising any rowing upon the river *Thames*, between *Gravesend* in the county of *Kent*, and *Windsor* in the county of *Berks.*; on the complaint of *Thomas Neal*, a waterman and liveryman, rowing and working boats upon the river *Thames*, between such limits, and a freeman of the said society or company, for working a boat for hire and gain on the river *Thames*, at *Richmond*, in the county of *Surrey*, between the said limits, and receiving, taking, and carrying in his boat more than eight passengers at one and the same time. In order to enforce this conviction, it became necessary to apply to a justice of the peace to issue his warrant. Two objections to this proceeding were made before the justice ; first, that the witnesses upon whose evidence the conviction was founded were not examined on oath ; and second, that the overseers and rulers of the Watermen's Company had no jurisdiction over the matter in question. The justice, entertaining doubts whether he had authority to enforce the conviction, in consequence of these objections, refused to issue his warrant. It is now submitted, that both objections are well founded ; but supposing them to be doubtful, this is not a case in which the Court will compel the justice to do an act which may subject him to an action. First, the conviction could only have been made on oath. By stat. 10 *Geo. 2.*, c. 31, s. 8, it is declared to be unlawful for any waterman to "carry in his boat, on the river *Thames*, any more than a certain number of passengers at one and the same time ; and any person offending herein, and being thereof convicted *by the oath* of one

or more credible witness or witnesses, or by the confession of the party, before the lord mayor of the city of *London*, or one or more justice or justices of the peace, shall for the first offence forfeit 5*l.*" By the stat. 34 *Geo.* 3, c. 65, s. 5, in case "any waterman shall offend against the laws then in force, or thereafter to be made by the lord mayor and aldermen, or by the rulers, auditors, and assistants of the Watermen's Company, it shall be lawful for the *mayor*, *recorder*, or *any one alderman*, and *for any justice*, and *he* and *they* respectively, is and are hereby authorised and required to examine *upon oath* the complaint, or any witness or witnesses, touching such offence; and if the party or parties accused shall be convicted of any such offence, either by his, her, or their own confession, or by the oath of the complainant, or of one or more credible witness or witnesses, it shall be lawful for such mayor, &c., or any one of them, to impose a fine," &c. Now it is clear, from these statutes, that supposing the jurisdiction to convict, be exclusively confined to the mayor of *London*, &c., and justices of the peace, the conviction can only be founded on oath of the witnesses, if the party does not confess. By sec. 9, of the last-mentioned statute, power is given to the overseers or rulers of the Watermen's Company, to hear and determine complaints between watermen and watermen, and convict the offender, and impose a fine upon him for his offence, not exceeding the penalty or penalties inflicted by that act, &c. No authority is given to the rulers to hear and determine *on oath*; but in case the party convicted shall not pay the penalty imposed, *it shall be lawful* for the mayor, &c., or justices respectively, upon production to him of such conviction, drawn up in writing, to issue his warrant for apprehending the offender, and to cause the offender to be brought before him; and upon being so brought, if the party convicted shall not forthwith pay the penalty, he shall be committed for any time not exceeding one month, unless the penalty is sooner paid. Now it is a matter of serious doubt, whether the rulers of

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the Watermen's Company have jurisdiction to commit at all under this act. It is clear they have no jurisdiction to administer an oath. Can, therefore, a conviction be enforced by the justices, which has not been made upon oath? It is a general rule of law, in the administration of justice, that the examination of witnesses must be upon oath, and that no legal conviction can be founded upon any testimony not so taken (*a*); but as the rulers of the Watermen's Company have no power to administer an oath, can a justice of the peace be compelled to enforce a conviction not founded upon the known and acknowledged principles of justice? It is true that the 9th section of the act referred to, makes it *lawful* for the justice to enforce a conviction so made; but it is not imperative on him so to do, and therefore the Court will not impose upon him a task, by which he may be subjected to an action; *Rex v. Justices of Bucks.* (*b*). Here the justice entertains a reasonable doubt of his jurisdiction, and he cannot be compelled by mandamus to proceed.

Bolland, contra, contended, first, upon the express words of the 9th section of the 34 Geo. 3, c. 65, that the rulers of the Watermen's Company had jurisdiction to convict in this case; and second, that as the only mode of enforcing the conviction was by applying to a justice, it was incumbent upon the latter, as a ministerial officer, to issue his warrant.

ABBOTT, C. J.—How can we order a magistrate to do that which may subject him to an action? This may be the only mode of enforcing the conviction made by the rulers of the Watermen's Company, but it does not seem to me to be obligatory on the magistrate to issue his warrant. All that the 9th section of the act says, is, that it shall *be lawful* for him to do so and so; it does not go on

(*a*) See Paley on Convictions, 2nd ed., 33, 34.

(*b*) Ante, vol. ii., 689. 1 B. & C. 485.

to say, "and he is hereby required." If the conviction itself is not valid in law, for not having been founded on *oath*, and the magistrate issues his warrant to apprehend the party, he will be liable to an action of trespass ; and we cannot compel him to put himself in a situation of so much responsibility. If a justice of the peace criminally forbears to discharge his duty, he is amenable for his conduct by information, as for a public offence ; but that is a very different thing from commanding him to do that which may subject him to an action..

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AGENT.

See GUARANTY.—SET-OFF.—SURETY.

Where the agents for the grantor and grantee of an annuity rendered an account to the latter, in which they gave him credit for instalments due from the former, stating at the same time that the money had *not* been then received, and allowed the grantee to draw upon them for the amount; and the agents having in about twelve months afterwards become bankrupt, and neglected to apprise the grantee in the interval that the instalments still remained unpaid by the grantor, who had become insolvent:—Held, that the money so advanced to the grantee was not recoverable back by the assignees of the agents. *Shaw v. Picton, M. 6 G. 4.* 201

AGREEMENT.

See STAMP.

ALIEN ENEMY.

See INSURANCE, 2.

ANNUITY.

See AGENT.—SURETY.

Where the memorial of an annuity-deed described one of the subscribing witnesses to the warrant of attorney by the initial of his christian name only:—Held, a ground for setting aside the warrant of attorney, and judgment thereon. *Metcalf v. Earl of Strathmore, H. 6 & 7 G. 4.* 779

APPEAL.

See NOTICE OF APPEAL.

ASSUMPSIT.

ARBITRATOR.

Where an arbitrator who had made his award in the plaintiff's favour, was supposed to have made a mistake in calculating the sum which the plaintiff claimed a right to recover:—Held, that the Court could not refer it back to the arbitrator to correct the mistake, without the consent of the defendant. *Ex parte Cuerton, H. 6 & 7 G. 4.* page 774

ARREST.

See AFFIDAVIT OF DEBT.—COSTS, 4. PRACTICE, 2, 4, 6.

ASSIGNMENT.

See ASSUMPSIT.—PARTNERS, 2.

ASSUMPSIT.

See BANKRUPT.—BASTARD.—GUARANTY.—LANDLORD AND TENANT, 1.—LUNATIC.—MONEY HAD AND RECEIVED.—PLEADING, 2, 3, 11.—PRACTICE, 13.—SET-OFF.

Declaration, in assumpsit, that plaintiff had bargained with *A. B.* for the purchase of freehold houses; that defendant, in consideration that plaintiff would give up the bargain to him (defendant), and permit him to become the purchaser of the houses, promised to pay 40*l.*; that plaintiff did give up the bargain to defendant, and permit him to become the purchaser; that defendant did become the purchaser, and take the bargain, and obtained a conveyance of the houses from *A. B.*, on the terms aforesaid; but that defendant would not pay the 40*l.*:—Held, first, that it must be presumed, after verdict for the plaintiff, that the bargain between him and *A. B.*, was in writing; and, second, that the assignment of that bargain to the defendant was a good consideration to support assumpsit. *Price v. Seaman, (in error), M. 6 G. 4.* 14

AWARD.

ATTACHMENT.

See AFFIDAVIT.

ATTORNEY.

See EVIDENCE, 6.—PLEADING, 10.
—PRACTICE, 6, 9.—SUPERFLUOUS COUNTS.

1. A certificate is, *prima facie*, evidence of the legal right of an attorney to practise. *Pearce v. Whale*, H. 6 & 7 G. 4. page 512
2. Where an attorney was admitted in K. B., in 1792; took out his certificate, and practised regularly till 1814; then discontinued his certificate till 1819, when he again took it out regularly, and practised in C. P.:—Held, in an action by him in K. B., for the costs of defending a suit in C. P., that the production of his certificate was *prima facie* evidence of his having been re-admitted in some Court, and that it lay on the defendant, in answer to the action, to prove that he had *not* been re-admitted in any Court. *Id.* *ib.*

AVOWRY.

See LANDLORD AND TENANT, 2, 3.

AWARD.

See ARBITRATOR.

Where an Inclosure Act directed the Commissioners to fix and ascertain the boundaries of a parish, and *advertise* in a provincial newspaper the boundaries so fixed and ascertained; and that the boundaries so *fixed and ascertained should be set forth and described in their award*, and be final, binding, and conclusive on all parties whatsoever; and the commissioners *advertised* one set of boundaries, which varied from those described in the award:—Held, that the award was not conclusive. *Rex v. Washbrooke*, M. 6 G. 4. 221

BARGAIN AND SALE. 869

BAIL.

See AFFIDAVIT OF DEBT.—PRACTICE, 6, 7, 8, 11, 14, 16.

BANK OF ENGLAND.

See ACTION ON THE CASE, 2.

BANKERS.

See MONEY HAD AND RECEIVED.

BANKRUPT.

See ACTIONABLE WORDS.—AGENT.
—EVIDENCE, 5.—PLEADING, 11.
—TROVER.

1. A judgment for damages and costs in assumpsit, is a *debt contracted* within the meaning of the 46 Geo. 3, c. 135, s. 2, and proveable under a bankrupt's commission; though final judgment is not entered up until after the commission issues. *Ex parte Birch*, M. 6 G. 4. page 436
2. A person against whom a commission of bankrupt has issued, and who has obtained his discharge out of custody in an action pending against him, *on the ground of his bankruptcy*, cannot afterwards dispute the validity of the commission in a Court of law: his remedy, if the commission is irregular, is by application to the great seal for a supersedeas. *Watson v. Wace*, H. 6 & 7 G. 4. 633

BARRISTER.

See MANDAMUS, 2.

BARGAIN AND SALE.

Tenant in tail in possession of hereditaments and premises, subject to an outstanding term, by indenture, for the barring all estates tail and all remainders thereupon expectant, and for limiting the same to himself, his heirs and assigns for ever; and in consideration of ten shillings

to him paid; granted, bargained, and sold the said hereditaments and premises; and the reversion, remainder, &c., thereof, to L. & B., their heirs and assigns, to hold to them, their heirs and assigns, to the use of L., that he might become tenant of the freehold, in order to suffer a recovery. The deed was duly inrolled as a bargain and sale:—Held; that by that deed L. became solely seized of the premises, so as to be a good tenant of the freehold for suffering a recovery of the entirety of the premises. *Haggerston v. Hanbury*, H. 6 & 7 G. 4. page 723

BASTARD.

Where the supposed father of an illegitimate child had made various payments for its maintenance, and then refused to continue its support, until the mother obtained an order of filiation:—Held, that no action would lie for arrears of maintenance, at the suit of the mother. *Furillio v. Crowther*. H. 6 & 7 G. 4. 612

BILL OF EXCHANGE.

See PROMISSORY NOTE.

BILL OF SALE.

See EXECUTION, 1.

BRIDGES.

The inhabitants of a county are not liable to *widen* a public bridge, by force of their obligation to repair it. *Rex v. Devon*, M. 6 G. 4. 147

BROKER.

See PARTNERS, 1.

BYE LAWS.

See CORPORATION.

A bye law that no person, not being free of the Pewterers' Company,

CHAPEL OF EASE.

shall exercise the trade of a pewterer within the city of *London*, is a bye law in restraint of trade, and is void, without proof of a special custom to support it. *Chamberlain of London v. Compton*, H. 6 & 7 G. 4. page 597

CASE.

See ACTION ON THE CASE.

CERTIORARI.

See COSTS, 1.

1. This Court, in its discretion, will not allow the plaintiff to remove a replevin cause by certiorari, *per saltum*, from the Sheriff's Court of *Carmarthen* into this Court; for certiorari lies, *of course*, only to inferior Courts of *Record*, and the Sheriff's Court is *not* a Court of Record for the purposes of a plaint in replevin: the proper course is to remove it first into the Court of Great Sessions by *re. fa. lo.* *Edwards v. Bowen*, H. 6 & 7 G. 4. 709
2. It is a general rule, that certiorari does not lie to remove a cause from an inferior Court, after judgment signed there; especially where the defendant suffered judgment by *default*. *Walker v. Gann*, H. 6 & 7 G. 4. 769
3. Where in an action for 16*l.*, brought in the Forest Court of *Knaresborough*, the defendant suffered judgment by default, and afterwards sued out a certiorari to remove the cause into this Court:—Held, that the certiorari was too late, and this Court made a rule for a *procedendo* absolute, though the defendant, in opposition to that rule, swore that the jurisdiction of the inferior Court was limited to 5*l.* *Id.* *ib.*

CHAPEL OF EASE.

See QUARE IMPEDIT.

CONSPIRACY.

CHARTER.

See CORPORATION.—QUO WARRANTO.

No charter granted to a corporation by the crown can be *partially* accepted. *Rex v. Westwood*, M. 6 G. 4. page 267

CHOSE IN ACTION.

See ASSUMPSIT.

CHURCH.

See PEW---PROHIBITION---QUARE IMPEDIT.

CHURCHWARDENS.

See MANDAMUS, 5.

COMMON.

See PLEADING, 13.

COMMITMENT.

See CONVICTION, 1.

CONSIDERATION.

See ASSUMPSIT.

CONSIGNOR AND CONSIGNEE.

See STOPPAGE IN TRANSITU.

CONSPIRACY.

Indictment against A., B., C., and D., for a conspiracy, charging that they conspired together, and with *divers other persons unknown*. A. and B. were tried. A. was found "not guilty," and B. was found "guilty of conspiring with C." C. had pleaded before the trial of A. and B.; but neither he nor D. appeared to take their trials. On motion to arrest the judgment against B., or to suspend it until C. should be tried:—Held, that the verdict was conclusive against B., as a general verdict of guilty; and that

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judgment might be given against him, without reference to what the verdict might be on the trial of C. *Rex v. Cooke*, H. 6 & 7 G. 4.

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CONSTABLE.

Actual residence in the parish is essential to impose upon the occupier of property the burden of serving the office of constable. *Rex v. Adlard*, M. 6 G. 4. 340

CONSUL.

See AFFIDAVIT OF DEBT, 2.

CONVICTION.

See JUSTICES, 1, 2.

1. If a warrant of commitment in an execution, manifestly defective on the face of it, shews that there has been a conviction, the Court will not notice the defect, until the conviction is returned into Court. *Rex v. Taylor*, H. 6 & 7 G. 4. 622
2. Conviction, on the 4 G. 4, c. 34, of an apprentice for misbehaviour, must shew on the face of it, that the defendant is an apprentice within the 4 G. 4, c. 29, which extends previous acts to apprentices, upon whose binding out no larger sum than 25*l.* has been paid. *Id.* *ibid.*
3. An alternative charge in a conviction is bad. *Rex v. Pain*, H. 6 & 7 G. 4. 678
4. Conviction, on 5 G. 4, c. 108, s. 49, for being on board a boat liable to forfeiture, by s. 3, for having casks attached thereto, "of the description used, or intended to be used, for the smuggling of spirits:" quashed for uncertainty. *Id.* *ibid.*

COPYHOLDS.

There can be no general occupancy of copyhold property, nor a special

occupancy, but by custom, or by the designation of a special occupant in the lord's grant. Therefore, where a copyhold estate was granted to *A.* for her own life, and the life of *B.*, with a grant of the reversion to *C.* for other lives, and *A.* devised the estate to *B.*, who kept possession for more than twenty years:—Held, that *C.*'s right of possession attached on the death of *A.*; and as no claim had been made within twenty years, an ejectment for the premises was barred by the Statute of Limitations. *Doe v. Scott*, *M. 6 G. 4.* page 190

COPYRIGHT.

The author, or publisher, of a work of libellous or immoral tendency, can have no legal property in it, and cannot maintain any action for an infringement of his supposed copyright in it. *Stockdale v. Onwhyn*, *H. 6 & 7 G. 4.* 625

CORPORATION.

See **BYE LAWS.—CHARTER.—PLEADING, 10.—QUO WARRANTO.**

1. Every corporation has a power to make bye laws, incident to the whole body; therefore, where a charter gives to a select body a power to make bye laws in certain cases specified therein, the incidental power of the whole body to make bye laws in other cases, is not taken away. *Rex v. Westwood*, *M. 6 G. 4.* 267
2. A corporation consisted of mayor, bailiffs, aldermen, and burgesses. The bailiffs and aldermen formed a common council, and were chosen out of the burgesses. The charter vested the right of electing burgesses in the mayor and burgesses. The corporation made a bye law, vesting the right of electing bur-

gesses in the mayor and common council:—Held, per *Holroyd* and *Littledale*, *Js.*, *Bayley*, *J.*, dissentiente, *Abbott*, *C. J.*, dubitante, that the bye law was good. *M. 6 G. 4.* page 267

COSTS.

See **LANDLORD AND TENANT, 3.—PLEADING, 10.—SET-OFF.—SUPERFLUOUS COUNTS.**

1. Where defendant removes proceedings from an inferior Court by certiorari, plaintiff is not bound to follow the suit. In such case, if defendant signs judgment of non-pros, for want of a declaration, he is irregular, and is not entitled to costs. *Clark v. The Mayor of Berwick*, *M. 6 G. 4.* 104
2. If a debt be reduced below 5*l.* by the plea of the Statute of Limitations, the case is within the *London Court of Requests Act*, 39 & 40 *G. 3*, c. 104, s. 12, and the plaintiff is not entitled to costs. *Shaddick v. Bennett*, *M. 6 G. 4.* 229
3. A party entitled to enter a suggestion for the purpose of depriving a plaintiff of his costs under a *Court of Requests Act*, must apply promptly, and it is not sufficient that he applies before final judgment is signed. Where a defendant might have applied in *Easter term*, for such a purpose, but suffered all that term to elapse, and did not apply till *Trinity term*:—Held, that he came too late. *Hippesley v. Layng*, *M. 6 G. 4.* 265
4. Where a defendant was arrested for a sum of money, in respect of the greater portion of which the plaintiff knew, at the time, that the defendant had obtained his discharge under the *Insolvent Debtors' Act*:—Held, that the defendant was entitled to have his costs taxed under the 43 *G. 3*, c. 46, s. 3, as upon an arrest without

COVENANT.

probable cause. *Lord Huntingtower, v. Heely, M. 6 G. 4.*

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5. Where plaintiff, on the eve of trial, accepted from defendant a cognovit for a certain sum, payable at a future day, in full discharge of the action, and the Master, on taxation, allowed plaintiff costs previous to the cognovit: the Court refused to admit plaintiff's affidavit, stating a verbal agreement that he should have such costs in case defendant made default in payment, and that he had made such default, and made the rule for the disallowance of such costs absolute. *Anonymous, M. 6 G. 4.* 875

COUNTY.

See BRIDGES.

COURTS OF REQUESTS.

See COSTS, 2, 3.

1. The sum actually recovered must be considered as the debt for which the action was brought, within the *London Court of Requests Act, 39 & 40 G. 3, c. 104, s. 12.* *Shaddick v. Bennett, M. 6 G. 4.* 229
2. All the Court of Requests Acts are in pari materiâ, and they must all receive a similar construction. *Id.* *ibid.*

COVENANT.

See DEED.—PLEADING, 1, 7, 12.

1. Covenants to repair generally, and to repair within three months after notice in writing, are independent covenants. *Doe v. Meux, M. 6 G. 4.* 98
2. Where a landlord, finding the demised premises out of repair, gave the tenant three months notice to repair, pursuant to his covenant:—Held, first, that he could not maintain ejectment for a forfeiture until the three months had elapsed;

DEMURRER.

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and, second, that the notice was a waiver of the breach of the general covenant to repair. *Id.* *ibid.*

3. Plaintiffs enfeoffed defendant with a piece of land bounded on the west by a street, and on the east, part by buildings belonging to defendant, and part by buildings belonging to W. G. Defendant covenanted "that he would not, at any time after the feoffment, permit or suffer any warehouse door to be opened or put out to the front of the street." A warehouse door was put out in the buildings belonging to W. G., at the eastern extremity of defendant's land, about eight feet distant from, but giving access to, the street:—Held, that this was a breach of the covenant by defendant, though the premises in which the door was put out, did not stand upon his land, were not in his occupation, and were not level with the front of the street. *Mayor of Liverpool v. Tomlinson, H. 6 & 7 G. 4.* 566

CUSTOMS.

See COPYHOLDS.—INTEREST.

DEBT.

See AFFIDAVIT OF DEBT—BANKRUPT 1.—PLEADING, 10.

DEED.

See ACTION ON THE CASE.—BARGAIN AND SALE.—STAMP, 2.

Where a deed has no date, or an impossible date, *date* in other parts of the deed means *delivery*; but where it has a sensible date, *date* of the deed means the day of the date, and not the day of the delivery. *Styles v. Wardle, H. 6 & 7 G. 4.* 507

DEMURRER.

See PLEADING, 1, 2, 5, 6, 7, 10.

DEVIATION.

See POLICY OF INSURANCE, 1, 4.

DEVISE.

See COPYHOLDS.—MERGER.

1. Where a testator, being seised in fee of *gavelkind* lands, devised all his "*real estate*" to his nephew, *T. C.*, for life; remainder to trustees, to preserve contingent remainders; remainder to "*the heirs of the body of T. C., as well female as male, lawfully to be begotten, such heirs, as well female as male, to take as tenants in common, and not as joint tenants, and for default of such issue;*" remainder to trustees, for a term of 500 years, to raise 300*l.* for testator's niece, *A. C.*; remainder to testator's two nephews, *J. C.* and *C. C.*, for and during their respective natural lives, as tenants in common, and not as joint tenants; and after their respective deceases, to all and every the heirs of their respective bodies, as well female as male, such heirs to take in common, and not as joint tenants, and for default of such issue, remainder over to testator's own right heirs for ever:—Held, that the words *heirs of the body*, were to be construed as words of limitation, and not of purchase; and, consequently, that *T. C.* took an estate in tail general. *Doe v. Harvey, M. 6 G. 4.* page 78
2. Devise to *M. W.*, of "all that my messuage and tenement wherein I now dwell, with the garden and all the appurtenances thereto belonging; and I also give to the said *M. W.* all my household goods and chattels, and implements of household, within doors and without, all for her own disposing, free will and pleasure, immediately after my decease:"—Held, that *M. W.*

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took only an estate for life in the real property. *Doe v. Westley, M. 6 G. 4.* page 112

3. A devise of real estate "to *A.*, *B.*, and *C.*, and their heirs, to be sold, and the money to be equally divided amongst them," is a devise in joint tenancy of the land, and in tenancy in common of the produce of the land when sold; therefore, the heir at law of *A.* cannot maintain ejectment for the land, without giving direct evidence of the deaths of *B.* and *C.* *Goodtitle v. Oxley, H. 6 & 7 G. 4.* 535
4. Devise of real estate to certain persons for life; and then "to *J. C.*, or his male heir, if any, free land, not to be sold nor mortgaged; and if no male issue, lawfully begotten by the said *J. C.*, then the above lands to fall to the first male heir of the branch of my uncle *R. C.*'s family; yielding and paying unto such of the daughters of the aforesaid *R. C.*, which shall be then living, the sum of 100*l.* each, at the time of the taking possession of the aforesaid estates." *R. C.* was dead when the will was made, leaving five daughters, but no son; the eldest of those daughters had four daughters, but no son; all the others had sons; and all these were well known to the testator. *J. C.* died without issue. The fourth daughter of *R. C.* died before any of her sisters, and before the expiration of the life estates, leaving a son:—Held, per *Holroyd* and *Littledale, Js.*, *Abbott, C. J.*, *absente*, *Bayley, J.*, *dissentiente*, that such son came within the description of "*first male heir of the branch of R. C.'s family*," and was entitled to the estates. *Doe v. Perratt, H. 6 & 7 G. 4.* 733

ECCLESIASTICAL JURISDICTION.

See PEW.—PROHIBITION.

EVIDENCE.

EJECTMENT.

See COPYHOLDS.—COVENANT, 2.—
DEVISE, 3.—EXECUTION, 2.—
MERGER.

ERROR.

See ACTION ON THE CASE, 2.

ESCAPE.

See PRACTICE, 15.

ESTOPPEL.

See PLEADING, 4.

EVIDENCE.

See ATTORNEY.—BYE LAWS.—
COSTS, 5.—DEVISE, 3.—HUN-
DRED.—INSURANCE, 6.—LAND-
LORD AND TENANT, 5.—QUARE
IMPEDIT.—TENDER.—VARI-
ANCE.

1. Trespass for breaking and entering a close, parcel of *Forton Farm*. Plea, that *J. W.*, as whose servant defendant justified, was seised in fee of 50 acres of land adjoining the close in which, &c.; and that by deed of 1736, between *F. C.*, who was seised in fee of the close in which, &c., and *R. W.*, who was seised in fee of the 50 acres, *F. C.* granted to *R. W.*, his heirs and assigns, for the time being, owners in fee of the 50 acres, the privilege of hunting for game in the close in which, &c. Replication, that *F. C.* did not grant to *R. W.* the privilege, as in the plea mentioned. Issue thereon. No proof of the grant pleaded, but proof that, by deed of the same date, *R. W.*, who was seised in fee of the manor of *Middleton*, conveyed *Forton Farm* to *F. C.* in fee, reserving all royalties; that from 1753, the gamekeepers of the lords of the manor were accustomed to sport over *Forton Farm*, with the knowledge of plaintiff and his

EVIDENCE.

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landlords, the owners of *Forton Farm*; that about 14 years ago, plaintiff, by desire of his landlord, gave notice to the gamekeeper of the lord of the manor not to trespass, but that he continued to sport there by the order of the lord of the manor, without further interruption:—Held, that upon such evidence the jury could not presume a grant. *Pickering v. Noyes*, *M. 6 G. 4.* page 49

2. Second plea, that *R. W.*, who was seised in fee of the close in which, &c., by indenture of 1736, granted to *F. C.*, his heirs, &c., the close in which, &c., reserving all royalties; deducing title in the said royalties from *R. W.* to *J. W.*, and justifying as servant to *J. W.* Replication, that defendant did not enter the close to exercise the said royalties. Issue thereon:—Held, that upon this issue, defendant was bound to prove, first, that he had a right of free-warren; and second, that at the time of the supposed trespass, he was in the due exercise of it. *Id.* *ibid.*
3. In an action for words of and concerning plaintiff as “treasurer and collector” of certain tolls and rates, it appearing that the words were spoken of him in his character of collector only:—Held, that without due proof of his appointment as collector, pursuant to a private act of parliament, the action was not maintainable, even though he had acted as such collector at the time the words were spoken. *Sellers v. Killew*, *M. 6 G. 4.* 121
4. Declaration by the payee against the maker of a promissory note to the order of the payee for “value received,” is not disproved by evidence of a note payable to the plaintiff’s order, for “value received in Mrs. *L.’s* estate.” *Bond v. Stockdale*. *M. 6 G. 4.* 140
5. A conveyance to husband and

wife, and their heirs, as joint tenants, "in consideration of 200*l.* now in hand, duly paid by husband and wife," may be explained by extrinsic evidence, shewing that the money belonged to the wife only, so as to defeat the claim of the husband's assignees, under 21 J. 1, c. 15, s. 5. *Doe v. Statham* M. 6 G. 4. page 141

6. By memorandum, dated November, 1822, A., an attorney, agreed with B., for a valuable consideration, to take C. (the son of B.), into partnership, as *attornies and solicitors, for ten years*, and to allow him a moiety of the profits. The memorandum did not state when the partnership was to commence. C. was not admitted an attorney until April, 1823, but he conducted the business in the name of A. from January, 1823. In an action by A. against B. for part of the consideration money:—Held, first, that the agreement, though legal on the face of it, upon proof of C. not being admitted an attorney till after its execution, became illegal, within 22 Geo. 2, c. 46, s. 11, and void. Second, that such proof was properly admitted, on the part of the defendant. Third, that proof, on the part of the plaintiff, that the agreement was to be kept as an *escrow*, and not acted upon, till after C.'s admission, was inadmissible, and properly rejected. And, fourth, that if such proof could have been admitted, the declaration, which described the agreement as one to commence *in presenti*, could not be supported by *parol* evidence, that it was to commence *in futuro*, the agreement being for more than one year, and the whole of it, therefore, required to be *in writing*, by the Statute of Frauds, 29 Car. 2, c. 3, s. 4. *Williams v. Jones*, H. 6 & 7 G. 4. 548

7. Declaration entitled generally of

Michaelmas term, Plea, that the cause of action did not accrue within six years next before *the exhibiting of plaintiff's bill*:—Held, that defendant might give evidence of the day on which the bill was actually filed, in order to support his plea. *Granger v. George*. H. 6 & 7 G. 4. page 729

EXECUTION.

1. Where the *bona fide* assignee of a bill of sale executed by the sheriff under a *fi. fa.* against the goods of A., allowed the latter to remain in possession and enjoyment of the goods, until another execution was put in, and the same effects were again seized:—Held, that the first execution, being notorious, the assignee of the bill of sale might maintain trespass against the sheriff, and that an absolute change of possession was not necessary to give effect to the bill of sale as against creditors. *Lattimer v. Batson*, M. 6 G. 4. 106
2. Where *landlord* defends, and a verdict and a judgment are obtained against him in ejectment, there is no necessity for any further order of the Court, to enable the plaintiff to sue out execution. *Doe v. Bennett*, M. 6 G. 4. 261

FOREIGN JUDGMENT.

See PLEADING, 4.

FREEHOLD.

See ACTION ON THE CASE.

FREE-WARREN.

See EVIDENCE, 1, 2.

FREIGHT.

See INSURANCE, 1, 5.

GAME.

See EVIDENCE, 1, 2.

HUNDRED.

GAVELKIND.

See DEVISE, 1.

GRANT.

See BARGAIN AND SALE.—COPY-
HOLDS.—EVIDENCE, 1, 2.

GUARANTY.

See JOINDER OF PARTIES.

A. gave B. the following guaranty:—

“ I have given C. an order to purchase cotton, and as it may be to my advantage to have his bills on me negotiated through your house, I have in such case to request that you will honour his drafts to the amount of those he may send to you for sale, on my account; and I engage that his bills on me, so transmitted, shall be regularly accepted and paid:”—Held, that under this guaranty, B. was justified in honouring C.'s draft to the amount of a bill drawn by C. on A., and represented by C. to B., as being drawn on account of A., though such bill was in fact drawn by C. on his own account. *Ogden v. Aspinall*, H. 6 & 7 G. 4.

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HIGH CONSTABLE.

See HIGHWAYS.

HIGHWAYS.

See NOTICE OF APPEAL.

Where the notice of holding a special session for making an order to divert a public footway, under 55 Geo. 3, c. 68, s. 2, was served on the justices of the district by the magistrates' clerk, and not by the high-constable:—Held, that the proceeding was irregular. *Rex v. Justices of Surrey*, 6 & 7 G. 4.

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HUNDRED.

The 3 Geo. 4, c. 33, gives a summary

INSOLVENT. 877

remedy against the hundred, to the extent of 30*l.*, for injury sustained by the unlawfully and maliciously burning any house, barn, or stack, &c., although the injury be not committed by a riotous and tumultuous assembly: and the evidence of the party grieved is admissible before the quarter sessions on appeal, as well as before the justices at petty sessions. *Rex v. The Justices of Somersetshire*, M. 6 G. 4. page 386

INDICTMENT.

See CONSPIRACY.—CONSTABLE.—
PERJURY.—PLEADING, 8. 9.

Indictment charging “ that defendant, in a church-yard, unlawfully interrupted and obstructed W. C., clerk, in reading the order for the burial of the dead, and interring a corpse, and unlawfully, by threats and menaces, hindered the burial of the corpse;—Held bad, in arrest of judgment; first, for not averring that W. C. was a clerk in holy orders, and lawfully acting as such in the burial of the corpse; and second, for not setting out the particular threats and menaces used by defendant. *Rex v. Cheere*, M. 6 G. 4. 461

INHABITANT.

See CONSTABLE.—RATE, 1.

“ Inhabitant, or other,” in the 43 Eliz. c. 2, s. 1, means, *resident* inhabitant, or other *inhabitants*. *Rex v. North Currey*, M. 6 G. 4. 424

INNS OF COURT.

See MANDAMUS, 2.

INSOLVENT.

See COSTS, 4.—PRACTICE, 3.

1. An insolvent was brought up at the assizes under the compulsory clauses of the Lords' Act, 32 Geo. 3,

c. 28, ss. 16 & 17, to deliver in a schedule of his estate, and not being prepared to do so then, was remanded generally; but as more than 60 days would have elapsed before the next assizes, the Court, at the instance of the prisoner, made an order upon the gaoler to bring him up at the subsequent assizes for examination, notwithstanding the lapse of 60 days. *Rex v. Belk*, M. 6 G. 4. page 234

2. An insolvent is bound to insert in his schedule a *claim* which he even supposes himself erroneously to have upon property, as part of his estate and effects, within the meaning of the compulsory clauses of the Lords' Act. *Id.* 235

INSURANCE.

See SHIP.

1. Where a vessel insured on freight, at and from Grenada to London, arrived in safety, and proceeded to deliver her outward cargo in different bays of the island, (where there is but one custom-house), and was lost in entering a bay, into which she was going, for the double purpose of delivering the remainder of her outward, and taking in a homeward cargo:--Held, that this was not a deviation, and that the underwriters were liable for the loss of the homeward freight. *Warre v. Miller*, (in error). M. 6. G. 4. 1
2. A mis-description of a party applying to the crown, for a license to trade with an enemy, if made without fraud, does not vacate the license, or vitiate a policy effected upon it. *Vaughan v. Lemcke*, (in error). M. 6 G. 4. 236
3. Policy of insurance on goods, with a warranty against average, "unless general, or the ship be stranded." On the voyage, the ship was driven by stress of weather, into a harbour, at the mouth of which she struck upon an anchor, and was

in danger of sinking; to prevent which, she was warped higher up in the harbour, where she took the ground, and remained fast half an hour:--Held, that the ship was stranded, within the meaning of the policy. *Barrow v. Bell*, M. 6 G. 4. page 244

4. Policy on a ship "from London to New South Wales, and from thence to all ports and places in the East Indies; or South America; with liberty to take in and land goods and passengers, and to trade backwards and forwards, and forwards and backwards." On arriving at New South Wales, the captain was ordered by his owners to proceed on a trading voyage to New Zealand, and from thence direct to South America. He proceeded to New Zealand with passengers, and was returning from thence to New South Wales, when the ship was totally lost:--Held, that the sailing from New South Wales to New Zealand, and back, was a deviation from the voyage insured, by which the insurers were discharged. *Bottomley v. Bovill*, H. 6 & 7 G. 4.

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5. Where a vessel was chartered for six months certain, the freighter to pay 200*l.* per month, and so in proportion for any longer time she might be employed, the owner to keep the ship in repair during the voyage; and in consequence of the perils of the sea, the vessel was obliged to be repaired twice in the course of the voyage, which detained her uselessly to the freighter for 38 days:--Held, that he was still liable for freight during such detention. *Ripley v. Scaife*, 6 & 7 G. 4. 818
6. A., B., C., and D., employ a broker to effect a policy of insurance on goods on board a certain vessel, and upon a loss happening, an action was brought in the broker's

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name, against the under-writers. A.'s evidence being necessary to the maintenance of the action, he, in order to render himself competent, executes a release to the broker for a nominal consideration, of all liability to him for the money to be recovered in the action; and after action brought, he conveys all his interest in the policy of *L. and R.* for a nominal consideration, having, with his co-assured, previously executed a bond of indemnity to the broker, for the costs of the action:—Held, on error, that A. was still liable for costs to the attorney who brought the action, and was therefore an incompetent witness;semble, that the machinery resorted to, for the purpose of making A. a competent witness, amounted to maintenance. *Bell v. Smith*, *H. 6 & 7 G. 4.* page 846

INTEREST.

Interest is not payable on money lent, unless by the usage of trade, or from the course of dealing between the parties, a bargain to pay interest can be inferred. *Shaw v. Picton*, *M. 6 G. 4.* 201

JOINDER OF PARTIES.

See PLEADING, 6.

Where a guaranty was given personally and individually to one of several partners in a firm:—Held, that an action might be maintained in the names of all the firm, if it appeared that the guaranty was intended for the benefit of all. *Garrett v. Handley*, *M. 6 G. 4.* 144

JURORS.

See MIS-TRIAL—SESSIONS.

JUSTICES.

See CONVICTION. — HUNDRED. — MANDAMUS, 3.—NOTICE OF APPEAL. — SESSIONS. — PRACTICE, 14.

LANDLORD AND TENANT. 879

1. A justice convicted of a misdemeanour in his office, must attend in person to receive the sentence of the Court; but upon an affidavit of age and infirmity, the Court will dispense with his personal attendance. *Rex v. Constable*, *H. 6 & 7 G. 4.* page 663
2. If a justice of the peace entertains a reasonable doubt of his jurisdiction, the Court will not compel him to do an act which may subject him to an action. *Rex v. Broderip*, *H. 6 & 7 G. 4.* 861

LANDLORD AND TENANT.

See COVENANT.—DEED—MERGER.
PAROL LICENSE.—PLEADING, 7,
12.—STAMP, 2.

1. The lessee of a house underlet the same at *Lady-day*, to A., as tenant from year to year, and before the end of the half year, put workmen into the house, with A.'s consent, for the purpose of repairing a party wall, but the inconvenience occasioned thereby was so great, that A.'s lodgers quitted the house, and he was obliged to take lodgings for his own family elsewhere, and after paying the rent up to *Midsummer-day*, he remained in possession, carrying on his trade till the 5th *July*, and then quitted, without notice to his landlord:—Held, that the latter could not maintain an action for use and occupation for the second half year, which had thus commenced, the jury finding that there had been no beneficial occupation. *Edwards v. Hetherington*, *M. 6 G. 4.* 11
2. Declaration in replevin. Avowry for double rent of premises, of which plaintiff was tenant from year to year, to defendant, and which he held over, after the expiration of his own notice to quit. Plea in bar, that the notice was not in writing, and was given less than six

months before the day therein mentioned for quitting possession. Replication, admitting the allegation in the plea, but averring that the demise was by parol, and that defendant recognised, assented to, and adopted the notice. On demurrer to the replication:—Held, first, that the tenancy was not determined, the notice to quit being insufficient, and there being no surrender in writing, or by operation of law, within the Statute of Frauds; second, that the landlord was not entitled to double rent, under the 11 G. 2, c. 19, s. 18; and third, that under this avowry, he could not recover the single rent; it not being part and parcel of the double rent avowed for. *Johnston v. Huddleston*, M. 6 G. 4. page 411

3. If a verdict be found for a defendant in replevin, upon an avowry generally, or as landlord, he is entitled to his double costs, under 11 G. 2, c. 19, s. 22, though the replevin be brought solely for the purpose of trying the title to the premises. *Staniland v. Ludlam*, M. 6 G. 4. 484

4. Double costs under this statute, (11 G. 2, c. 19), are estimated, by giving the defendant, first, the whole of his single costs, and then half that amount. *Id.* *ibid.*

5. By agreement in writing, dated 20th May, 1824, defendant “agreed to let plaintiff two upper rooms, and part of a lower room, as a workshop and smithy, and to find power for three lathes, &c.; defendant agreed to pay rent for the above, 61*l.* per year, to be paid quarterly in cash; and that three months’ notice was to be required on each party.” Plaintiff took possession of the rooms the same day, and defendant found the power. On the 20th August, defendant served plaintiff with a written notice of that date, to quit the rooms

on the 20th November following. Plaintiff did not *then* object to the notice, but held over after the 20th November, from which day defendant ceased to find the power. On the 19th January, 1825, plaintiff and defendant settled their accounts up to the 20th November preceding, when plaintiff agreed to give up the key of the rooms; but afterwards refused to do so, saying “that the notice was bad;” to which defendant replied, “then there would soon be another quarter’s rent due.” In an action by plaintiff for damages, for the discontinuance of the power by the defendant:—Held, that the agreement was a demise of a tenement, creating a tenancy which could not be determined but by a notice ending with the current year, except by custom; and that the plaintiff’s agreeing to give up the key *when he did*, was no acquiescence in the notice served upon him, and no surrender of his tenancy within the Statute of Frauds; though such an acquiescence, if established, would have been a bar to the action. *Brown v. Burtenshaw*, H. 6 & 7 G. 4. page 603

LEASE.

See COVENANT.—DEED.—LANDLORD AND TENANT.—MERGER.—PLEADING, 7, 12.—STAMP, 2, 3.

LIMITATIONS, STATUTE OF

See COPYHOLDS.—PLEADING, 2, 3.

The Statute of Limitations is a bar to an action of *trover*, commenced more than six years after the conversion, though plaintiff was ignorant of the conversion till within the six years; defendant not having committed any fraud to prevent plaintiff’s earlier knowledge. *Granger v. George*, H. 6 & 7 G. 4.

MANDAMUS.

LORDS' ACT.

See **INSOLVENT**.—**PRACTICE**, 3.

LUNATIC.

1. A lunatic is capable of contracting for necessaries. *Bagster v. The Earl of Portsmouth*, H. 6 & 7 G. 4. page 614
2. Where a person of rank ordered carriages suitable to his condition, and the coach maker supplied them bonâ fide and without fraud, and they were actually used by the party:—Held, that an action would lie upon the contract, notwithstanding an inquisition of lunacy finding the party to be of unsound mind at the time the carriages were ordered. *Id.* *ibid.*

MAINTENANCE.

See **INSURANCE**, 6.

MANDAMUS.

See **PRACTICE**, 14.

1. The sessions being equally divided in opinion on an appeal against an order of removal, quashed the order, instead of adjourning the appeal:—Held, that, even supposing their judgment to be erroneous, a mandamus would not lie to re-hear the appeal. *Rex v. The Justices of Monmouthshire*, M. 6 G. 4. 334
2. Mandamus does not lie to the benchers of an inn of court, to compel them to admit an individual to be a member of the society, for the purpose of qualifying himself to become a barrister. *Rex v. Lincoln's Inn*, M. 6 G. 4. 351
3. Mandamus lies to the justices and clerk of the peace of a borough, to permit the attorney on behalf of certain persons, contributors to the county rates, "to inspect and take copies of the last two rates made for the borough, and all orders made for the expenditure of the same, and the several orders of ses-

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sions made known, and all other proceedings and documents relating thereto." *Rex v. The Justices of Leicester*, M. 6 G. 4. page 370

4. Mandamus to the justices and the clerk of the peace of a borough, to permit the attorney on behalf of certain persons, contributors to the county rate, "to inspect and take copies of the last two rates made for the borough, and all orders made for the expenditure of the same, and the several orders of sessions made thereon, and all other proceedings and documents relating thereto," does not lie, till after application made to, and refused by, the justices assembled in quarter sessions. *Id.* 373
5. The Court will not grant a mandamus to churchwardens to allow an inspection of their accounts, under 17 G. 2, c. 38, s. 1, unless the applicant states some public ground for desiring such inspection. S. 14 of the act, which imposes a penalty upon churchwardens wrongfully refusing an inspection, is no answer to the application. *Rex v. Clear*, M. 6 G. 4. 393

MARSHAL.

See **PRACTICE**, 15.

MEMORANDUM. 487

MERGER.

T. W., being seised in fee of certain premises, by lease of 29th September, 1788, demised the same to *J. W.*, for twenty-one years, at the yearly rent of 60*l.* *J. W.* entered and kept possession of the premises, without paying rent, until his death in 1823. By will of 20th January, 1799, *T. W.* devised the premises to *J. W.* for life. By lease of 13th December, 1799, *T. W.* demised the premises to *J. W.* for sixty years from Michaelmas 1809, at the yearly rent of 60*l.* By

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lease and release, of 2d and 3d of May, 1806, *J. W.* conveyed his life estate on the premises to *J. P.*, in trust for him, *J. W.*:—Held, that the interest in the premises created in *J. W.* by lease of December, 1799, was an *interesse termini* only, and did not merge in the life estate devised to him by the will of January, 1799. *Doe v. Walker*, *H. 6 & 7 G. 4.* page 487

MIS-TRIAL.

Where an infant under the age of twenty-one years, not qualified by property, nor having been in fact summoned, personated his father as a juror, and joined in a verdict of guilty against a person indicted of perjury:—Held, that this was a mis-trial; and in the absence of all fraud on the part of the defendant, the Court granted a new trial. *Rex v. Tremaine*, *H. 6 & 7 G. 4.* 684

MONEY HAD AND RECEIVED.

See SET-OFF.

A., being a stranger, deposits, for a particular purpose, in the hands of *B.*, a country banker at *T.*, the sum of 800*l.*, in local bank notes; 655*l.* of which had been issued by *C.*, at *D.*: *B.* transmits the whole of the notes immediately to *C.*, and is credited with the amount in account with the latter, who re-issues the notes, and stops payment:—Held, that *A.* was entitled to recover the whole amount of the notes from *B.*, as cash received by the latter to his use. *Gillard v. Wyse*, *H. 6 & 7 G. 4.* 523

NONSUIT.

See PRACTICE, 13.

NOTICE OF APPEAL.

A notice of appeal by an inhabitant of a parish against an order for stopping up an unnecessary public foot

PARTNERS.

way, under the authority of 55 *G. 3*, c. 68, s. 2, must state that the appellant is "injured," or "aggrieved," pursuing the language of s. 3, the appeal clause, or the party will have no *locus standi* in curia. *Rex v. The Justices of Essex*, *H. 6 & 7 G. 4.* page 658

PAROL LICENSE.

In case for obstructing a drain, plaintiff claimed *right and title* to the drain by virtue of a license granted to his landlords, *their heirs and assigns*, to make the drain, and have the foul water pass from their scullery through the drain across defendant's yard into another yard appurtenant to the premises in plaintiff's occupation:—Held, that the interest, as declared upon by plaintiff, being in its nature *freehold*, and the license to support it being merely by parol, and not by deed, the action was not maintainable. *Hewlins v. Shippam*, *H. 6 & 7 G. 4.* 783

PARTNERS.

See EVIDENCE, 6.---GUARANTY.---JOINDER OF PARTIES.---RATE, 1.

1. A merchant in *London* authorises a broker at *Liverpool*, in writing, to purchase 1000 bales of cotton, and proposes to the latter, "to be allowed to be one-third interested therein, acting in the business free of commission. To this proposition the broker accedes, and purchases cotton in his own name, which is paid for solely by the merchant in *London*. In the subsequent correspondence between the parties, the transaction is spoken of as "a joint account," "joint concern," "joint purchase," "joint speculation," "joint cotton adventure." The broker effects insurances on the cotton against fire, and transmits the policies to the

merchant, informing him that the cotton is deposited in ware-rooms rented by him, (the broker), and that he holds the key for their joint security. The broker pledges the whole of the cotton to the defendant, for a debt due to the latter, and becomes a bankrupt:--- Held, that the broker was a *partner* with the merchant in the cottons, and that he had authority to pledge the whole to the defendant, as an innocent pawnee, without fraud. *Reid v. Hollmshed, M. 6 G. 4.* page 444

2. One of four partners having retired, the other three continued the business, assuming the funds, and charging themselves with the partnership debts. A., a creditor of the old firm, was informed of this arrangement, and his account was, with his consent, transferred from the old firm to the new, with whom he continued to have dealings, drawing upon them, and making them payments, for about twelve months, when they failed, in his debt :---Held, that the retired partner was still liable to A., for the balance due to him by the old firm, though if A. had drawn for that balance at any time during the solvency of the new firm, it would have been paid. *David v. Ellice, H. 6 & 7 G. 4.* 690

PATENT.

See VENUE, 1.

PERJURY.

See MIS-TRIAL.---PLEADING, 8, 9.

1. An indictment for perjury, charging that defendant "*falsely and maliciously gave false testimony*," without averring that the offence was "*wilfully*," or that it was "*corruptly*" committed, is bad in arrest of judgment. *Rex v. Richards, H. 6 & 7 G. 4.* 665

2. *Quære*, Whether an indictment at common law for perjury, must not charge the offence to have been *wilfully*, as well as *corruptly*, committed. *Id.* page 665
3. The first count of an indictment for perjury committed on a trial, charged that defendant was sworn and examined at the trial, and, that he deposed so and so, setting out the evidence, and then assigning perjury thereon, in the usual way. The fifth count, which assigned perjury on an affidavit sworn by defendant in opposition to a rule for a new trial in the previous case, after averring, by way of introduction, "that by means of the false testimony of defendant in the first count mentioned, prosecutor was unlawfully convicted," proceeded to allege, that defendant afterwards falsely swore in the affidavit, "that the evidence which he had given on the said trial was true," and then assigned the perjury by averring, "that whereas in truth and in fact, the evidence which defendant gave on the said trial was not true, *but was false in the particulars in the said first count of this inquisition assigned and set forth* :---Held, insupportable in the arrest of judgment. *Id.* *ibid.*

PEW.

See PROHIBITION.

1. A non-parishioner, whether extra-parochial, or residing in another parish, *can* have no right to a pew in the *body* of a parish church, except by prescription. *Byerley v. Windus, H. 6 & 7 G. 4.* 574

PLEADING.

See ASSUMPSIT.---BYE LAWS.--- COSTS, 2.---EVIDENCE, 1, 2, 7.--- INDICTMENT.---LANDLORD AND TENANT, 2.---LIMITATIONS, STATUTE OF.---PAROL LICENSE.---

**PBRJURY.---PRACTICE, 4, 12.---
QUARE IMPEDIT.---SUPERFLU-
OUS COUNTS.**

1. Covenant for non-payment of rent. Declaration, that plaintiff and his wife, since deceased, demised the premises to defendant, for 21 years, reddendum, and covenant to pay rent to plaintiff and his wife; that the wife died, and that afterwards rent became due to plaintiff. Plea, setting out the lease on oyer, by which it appeared that the reddendum, and the covenant to pay rent, was to plaintiff and his wife, *and her heirs*; and stating that plaintiff never had any estate in the premises, except in right of his wife, whose estate they were; that she died, without issue, leaving an heir, whereupon all the estate of plaintiff ceased; and that the heir threatened to enter and eject defendant, unless he attorned; and defendant was thereby compelled to attorn, and become tenant to the heir. Upon general demurrer:—Held, that this plea was good, and an answer to the action. *Hill v. Saunders (in error)*, M. 6 G. 4. page 17
2. Replication to a plea of the Statute of Limitations to a declaration containing several counts on promises, averred that before and at the time of the making the said *several* promises, defendant was in parts beyond sea, and afterwards returned, which was his first return after making *said several* promises, &c.:—Held, that the word “several” might be taken distributively, and construed to mean that it was defendant’s first return after “each and every” of the promises; and that at all events the want of these latter words was only ground for special demurrer. *Plummer v. Woodburne*, M. 6 G. 4. 25
3. A bailable writ, with an *ac etiam* clause *upon promises*, is a good continuance of a non-bailable bill

of *Middlesex*, so as to avoid the Statute of Limitations, and the continuances may be pleaded without a clause of *sicut pluries*. *Id.*

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4. A judgment obtained by defendant in the Colonial Courts cannot be pleaded by way of estoppel to a declaration in this country for the same cause of action, unless it is shewn that the judgment so obtained would be final and conclusive in the colonies. *Id.* *ibid.*
5. Plea, to assumpsit, for goods sold and delivered, “that the goods were, with the privity of plaintiff, sold and delivered to defendant by J. S., the agent of plaintiff, in the name and as the goods of J. S., and that defendant never knew plaintiff as the owner; that at the time of the sale and delivery, J. S. was, and still is, indebted to defendant in a sum exceeding the price of the goods; and that defendant is ready and willing to set off, and allow the plaintiff the price of the goods, out of the money so due and owing from J. S. :”—Held, good, on special demurrer. *Carr v. Hinchliff*, M. 6 G. 4. 42
6. Declaration in trespass against *three*. Plea by *all*, not guilty. Separate pleas of justification by *two*. Replication to these pleas, that those two defendants were guilty of excess. Rejoinder by *all three* defendants, that they were not *all three* guilty of excess. On demurrer, the rejoinders held ill, and judgment for plaintiff. *Morrow v. Belcher*, M. 6 G. 4. 187
7. Declaration on a covenant in a lease to deliver timber, growing on the demised premises, sufficient for the repairs thereof, averring that there was timber growing on the premises sufficient for the repairs, but that defendant did not deliver it. Defendant set out the lease upon oyer, and pleaded, first, non est

factum; and second, that there was not timber growing on the premises sufficient and proper for the repairs. Issue on both pleas:---- Held, first, that the only question upon the first issue was, whether the defendant had executed the lease as set out; for the lease, so set out, became part of the declaration, and its legal effect could not be questioned, except upon demurrer. Held, second, that the second plea was good, although it did not allege that there was not timber growing on the premises, sufficient for the repairs, or any part thereof. *Snell v. Snell*, M. 6 G. 4. page 249

8. Perjury being assigned on an affidavit made before a Master Extraordinary in Chancery, for the purpose of superseding a commission of bankrupt which had issued against the deponent, the indictment, after stating that the commission had issued declaring the deponent a bankrupt, stated, that such proceedings were thereupon had, under and by virtue of the said commission, that the bankrupt afterwards, and while the commission was in force, to wit, on, &c., at, &c., came before the Master Extraordinary, and did then and there exhibit a certain affidavit, concerning the commission and the proceedings under the same, entitled, "In the matter of *J. D.*, a bankrupt," and was then sworn thereto, and the defendant, well knowing the premises, and contriving unjustly to cause the commission to be superseded, did falsely, &c., swear, &c.; with an averment, "all which said matters and things, so as aforesaid deposed and sworn by the said *J. D.*, were and are material in the matter of the said *J. D.*, a bankrupt," before the Lord Chancellor: *Quære*, whether the perjury was not well assigned on the affidavit, by such a general averment, without going on to aver that the affidavit had been

used, or was intended to have been used, in a judicial proceeding, *Rex v. Dudman*, M. 6 G. 4. page 324

9. The word "commission," according to the context of the sentence in which it is used, may mean either the instrument by which authority is given to "commissioners," or the persons to whom authority is given. Therefore, where, in an indictment for perjury, assigned on a petition to the Lord Chancellor to supersede a commission of bankrupt, the indictment, professing to set forth only the substance of the petition, stated, "that at the several meetings before the commission the petitioner declared openly, and in the presence and hearing of *A. B.*, an assignee," so and so, and it appearing from the petition itself, that the allegation therein was, "that at the several meetings before the commissioners, the petitioner declared so and so:"—Held, that this was not a fatal variance. *Id.* *ibid.*
10. A private act, incorporating a Gas-light Company, enacted, that the costs of obtaining the act should be paid out of the money subscribed, in preference to all other payments. The attorney who obtained the act sued the company in debt, upon the act, for his costs:---Held, first, that the action was maintainable, without setting out any deed; and, second, that if not, still the objection could only be raised by special demurrer. *Tilson v. The Warwick Gas-light Company*, M. 6 G. 4. 376
11. Defendant in an action by assignees of a bankrupt, cannot plead the pendency of a former action brought against him by the bankrupt, for the same cause of action; for the assignees have no power to proceed with the former action.--- *Biggs v. Cox*, M. 6 G. 4. 409
12. Where the plaintiff declares as heir-at-law upon a lease granted

by his ancestor, he must shew *how* he is heir-at-law :---A general averment that the demised premises descended to him, *as cousin and heir-at-law*, is not sufficient. *Lidgbird v. Judd*, H. 6 & 7. G. 4.

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13. Trespass, for entering plaintiff's close, and with sheep consuming the herbage. Plea, that the locus in quo was part of a common, over which defendant had a right of common for sheep. Replication, that the locus in quo had been inclosed by the consent of the lord. On special demurrer to the replication, held bad, for not going on to state, that after the inclosure there was sufficient common left for the commoners. *Rogers v. Wynne*, H. 6 & 7 G. 4. 521

PLEDGE.

See PARTNERS, 1.

PRACTICE.

See AFFIDAVIT.—AFFIDAVIT OF DEBT.—ATTORNEY.—CERTIORARI.—COSTS.—EVIDENCE, 7.—EXECUTION.—INSOLVENT, 1.—JUSTICES.—MANDAMUS, 1.—PLEADING, 3, 4.—SUPERFLUOUS COUNTS.—WAGER.

1. Where a plaintiff refused to deliver a particular of his demand, in obedience to a Judge's order, the Court refused to allow the defendant to sign judgment of non-pros. *Somers v. King*, M. 6 G. 4. 125
2. Service of a copy of a bill of *Middlesex*, by placing it on the defendant's shoulder, after he has refused to take it, is sufficient; and if he is served the next day with another copy, and with notice of declaration at the same time, there is no irregularity. *Bell v. Vincent*, M. 6 G. 4. 233
3. An order to bring up an insolvent under the Lords' Act, at the "next

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assizes," will not authorise the examination of the prisoner at a *special gaol delivery*. *Rex v. Belk*, M. 6 G. 4. page 235

4. In cases of non-bailable process, if the defendant's name is misstated in the writ, the Court will not set aside the writ and proceedings on motion, but will leave the defendant to his plea in abatement. *Sarjant v. Gordon*, M. 6 G. 4. 258
5. Affidavits in a Court of Error must be entitled in the cause above, and not below. *Gandell v. Rogier*, M. 6 G. 4. 259
6. A defendant being arrested, employed, on the sudden, one attorney to put in bail for him, and another to carry on the subsequent proceedings. At the return of the writ each attorney gave notice of bail above, describing himself as the defendant's attorney. The plaintiff excepts to one set of bail, and that set not justifying, he attaches the sheriff, without regarding the notice of bail given by the second attorney :—Held, that he was bound to attend to both notices, and the attachment set aside for irregularity. *Gilmour v. Brindley*, M. 6 G. 4. 259
7. Exception must be entered to bail, before the body-rule can be served on the sheriff. *Rex v. The Sheriffs of Middlesex*, M. 6 G. 4. 264
8. If bail do not justify within four days after exception, plaintiff may proceed upon the bail-bond, even though the bail were put in earlier than was necessary; but he cannot attach the sheriff until the rule for bringing in the body has expired. *Bond v. Evans*, M. 6 G. 4. 374
9. The 3 Geo. 4, c. 102, giving increased jurisdiction to the Court, is to be construed liberally, for the dispatch of business; and an affidavit sworn during term, is sufficient to bring the subject matter

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- before the Court, as "a matter depending in the Court," within the terms of the act, and the king's warrant founded thereon. *Ex-parte Smith, M. 6 G. 4.* page 382
10. A judge's order for staying proceedings must be drawn up forthwith, and served immediately, otherwise it will not be binding. *Charge v. Farhall, M. 6 G. 4.* 422
11. A rule nisi for setting aside bailable process, &c., "with a stay of proceedings," does not enlarge the time for the defendant to put in and perfect his bail, until the rule is disposed of, so as to place him in the same situation he was in at the time the rule nisi was granted. *St. Hanlarc v. Byham, M. 6 G. 4.* 458
12. A mis-statement of defendant's *Christian* name in the commencement of his plea, does not entitle plaintiff to treat it as a nullity, and to sign judgment as for want of a plea. *Anonymous, H. 6 & 7 G. 4.* 511
13. In a joint action of assumpsit against two defendants, one of whom suffers judgment by default, and the other goes to trial, the plaintiff may elect to be nonsuited, as against the latter, if he finds that he cannot make out his case.—*Murphy v. Tomlan, H. 6 & 7 G. 4.* 619
14. After the determination of the Court, upon a rule nisi, for a mandamus, the question decided cannot be again discussed, as a special case, until there is a return made to the writ. *Rex v. The Justices of Leicester, H. 6 & 7 G. 4.* 708
15. A clerk in a mercantile house, described in the notice of justification as "gentleman," rejected as bail. *Moss v. Heavyside, H. 6 & 7 G. 4.* 772
16. In an action against the marshal for an escape, he is entitled to a particular of the cause of action

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for which the plaintiff sues. *Webster v. Jones, H. 6 & 7 G. 4.*

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17. Bail rejected where he was to receive a commission on the amount for which he proposed to justify *Foxhall's Bail, H. 6 & 7 G. 4.* 783

PROCEDENDO.

See CERTIORARI.

PROHIBITION.

See PEW.—SHIP.

1. Prohibition lies to restrain the spiritual court from proceeding in a suit brought by an extra-parochial person for a pew in the *body* of a parish church; either if the pew is claimed by any other title than prescription, or if it is claimed by that title, and the prescription is denied by the defendant. *Byerley v. Windus, H. 6 & 7 G. 4.* 574
2. Upon motion for a prohibition, this Court is not bound to wait till the suit in the spiritual court is actually *at issue*: if the latter is clearly in progress towards the trial of a question over which it has no jurisdiction, prohibition lies forthwith. *Id. ibid.*

PROMISSORY NOTE.

See EVIDENCE, 4.

An indorsement on a promissory note, with a *black lead pencil* instead of *ink*, is a writing in law, and gives the indorsee a right to recover upon the note in a court of law. *Geary v. Physic, H. 6 & 7 G. 4.* 653

PUTATIVE FATHER.

See BASTARD.

QUARE IMPEDIT.

Where the founder of a chapel of ease in the township of A., endowed it with lands for the maintenance of a chaplain, and by his will directed

that his son should, during his life, have the nomination and election of the minister, and might, by will, or deed, set down the order or course for the nomination and election of the minister after his death; and in default thereof, then directed that *the minister should be nominated and elected by all the householders or heads of families in the township, and the heirs male of the founder's body, and such other of his kindred or blood as should have any land in the township, or the greater number of them*; and the son not having set down any order or course for the nomination and election of a minister:—Held, in quare impedit, first, that the declaration which averred a nomination and election of a minister by the plaintiffs, being the greater number of the householders and heads of families in the township to whom the nomination and election of the minister then belonged, was ill, even after verdict, for not shewing that the heir male of the founder's body, and such of his kindred or blood as had lands in the township concurred in the nomination, or that they were in the minority, or that there were no such persons in existence; second, that the householders or heads of families, &c., had no right to present a curate to the chapel, without the consent of the vicar, even though the deed of consecration reserved all the *temporal* rights of the mother church; and third, that where a chapel of ease has been erected within the time of legal memory, the incumbent of the parish church is entitled to the nomination of the minister, unless there has been a special agreement to the contrary, to which the parson, patron, and ordinary are parties. *Farnworth v. The Bishop of Chester*, M. 6 G. 4.

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QUO WARRANTO.

The nomination of a corporate officer in a modern charter, by necessary intendment makes him a *free burgess* of the borough, if he were not so before. *Rex v. Downes*, H. 6 & 7 G. 4. page 777

RATE.

See INHABITANT.—MANDAMUS, 3, 4.

1. Partners, resident in one parish, but holding premises and carrying on business in another parish, by means of a servant who resides on the premises, are not *inhabitants* of the latter parish, within the meaning of the 43 *Eliz.* c. 2, s. 1, and are not rateable to the poor of that parish, in respect of their personal property situate within it. *Rex v. North Currey*, M. 6 G. 4. 424
2. By the statute 16 G. 3, c. 66; 25 G. 3, c. 87; and 30 G. 3, c. 60; the *Dudley Canal Company* was incorporated, but none of those acts contained any clause respecting the mode in which the company should be assessed to parish, or other taxes. By the 33 G. 3, c. 121, the old proprietors, and certain new ones were re-incorporated, for certain purposes, with the same powers as were given by the previous acts, to which reference was made: and this act, for the first time, empowered the company to make *collateral cuts*. By the s. 34, it was enacted, that the *said* company of proprietors should from time to time be rated to all parliamentary and parochial taxes and assessments, for or in respect of the lands and grounds *taken and used* by the *said* company, and all warehouses or other buildings erected, or to be erected by the *said* company of proprietors, *as other lands, grounds, and buildings, lying near to the said canal and collateral cuts*,

SESSIONS.

were, or should be rated :—Held, that this clause was not to be construed retrospectively, so as to divest the parish of *K.* of the right of assessing the canal to the relief of the poor, by including in the rateable valuation *the profits derived from the company's tonnage dues.* *Rex v. The Dudley Canal Company, M. 6 & 7 G. 4. page 466*

RECOVERY.

See BARGAIN AND SALE.

REVERSION.

See BARGAIN AND SALE.

SEAMAN.

See CONVICTION, 4.

A man rated on board an *East India* ship as a seaman, and who signs the ship's articles, and receives pay as such, is within the statute 2 G. 2, c. 36, and cannot maintain any action upon a *parol* agreement, subsequently made, for wages as *cuddy servant*, during the voyage. *Dafter v. Creswell, H. 6 & 7 G. 4. 650*

SESSIONS.

See HIGHWAY.—HUNDRED.—INHABITANT.—MANDAMUS, 1, 3, 4.
—NOTICE OF APPEAL.—RATE, 1.

A charter of *Car. 2*, gave to the lord of an ancient liberty the execution of all writs, processes, and precepts of his Majesty, within the liberty, and contained a non-intromittant clause, restraining the sheriff from entering, "unless it touched his Majesty, or his crown, and unless upon default of the bailiffs and officers" of the lord :—Held, that by virtue of this charter, and the provisions of stat. 27 H. 8, c. 24; s. 7, the lord's bailiff was bound to obey the sheriff's precept for returning jurors from the liberty to the quarter sessions; and that for

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SETTLEMENT.

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disobedience to such a precept, the justices at sessions had jurisdiction to impose a fine on the bailiff. *Rex v. Jaram, M. 6 G. 4. page 163*

SET-OFF.

See AGENT.—PLEADING, 5.

Where an agent has a general authority to receive and sell goods, and out of the proceeds to repay himself his advances, charges, and commission; the costs of an action, and a reference thereof, against a wrong-doer, who withholds the possession of the goods, *bonâ fide* incurred for the recovery of the goods, are legal charges upon the goods, and may be set off by the agent in an action brought against him by his principal for the balance of the proceeds of the goods. *Curtis v. Barclay, H. 6 & 7 G. 4. 539*

SETTLEMENT, by Tenement.

1. Taking a butcher's stall, attached to the freehold, in an inclosed market place, to which the pauper has access only on the market days, but of which he has the exclusive possession on those days, is, it seems, coming to settle on a tenement within the meaning of 13 & 14 Car. 2, c. 12, s. 1; but he can be considered as an occupier on the market days only: and, therefore, where the pauper occupied such a stall for thirty-eight market days, during a period of four months :—Held, that he gained no settlement. *Rex v. Caversham, M. 6 G. 4. 160*
2. In order to gain a settlement under 36 G. 3, c. 101, by paying rates, it is not necessary that the party should be rated at 10*l.* in the assessment; it is sufficient if the tenement be in fact of the value of 10*l.*, though it be rated at a less amount. *Rex v. St. Dunstan's, M. 6 G. 4. 178*

3. Landlord's fixtures, which are part of the freehold, may be taken into the valuation of a 10l. tenement, though without them the tenement would not be of sufficient value to gain a settlement. *Id.* page 178

SHERIFF.

See EXECUTION, 1.—PRACTICE, 6,
7, 8.—SESSIONS.—VARIANCE.

SHIP.

1. Whatever is on board a ship for the accomplishment of the objects of the voyage and adventure in which she is engaged, belonging to the owner, constitutes a part of the ship and her appurtenances, within the 53 G. 3, c. 159, and is liable for damage to another ship. *Gale v. Laurie, H. 6 & 7 G. 4.* 711
2. S. 1 of the 53 G. 3, c. 159, is to be construed as if it contained the words, "with all her appurtenances," like s. 7. *Id.* *ibid.*

SLANDER.

See EVIDENCE, 3.

Saying of an innkeeper, "he is a bankrupt, he will be in the *Gazette* in a twelvemonth, he is a pauper," is actionable, though he be not liable to the bankrupt laws. *Whitaker v. Bradley, H. 6 & 7 G. 4.* 649

SMUGGLER.

See CONVICTION, 4.

STAMP.

1. The indorsement on a deed of exchange, of the names of the executing parties, and the date, &c., is no part of the instrument itself, and therefore not to be taken into calculation with a view to the progressive stamp duty imposed by 55 G. 3, c. 184, sch. pt. 1, tit. *Exchange.* *Windler v. Fearon, M. 6 G. 4.* 185

STATUTES CITED.

2. Where A., by an agreement under seal, agreed to take and hire of B., a certain house and premises at a certain annual rent, but the instrument contained no words of demise, and there was nothing to shew when the interest was to commence or determine:—Held, that it was no more than an agreement for a lease, and being sealed, required a stamp for 1l. 15s., as a deed, "not otherwise charged," by 55 G. 3, c. 184, sch. part 1. *Clayton v. Burtenshaw, H. 6 & 7 G. 4.*

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By the same instrument, A. agreed to take the fixtures, stock in trade, and such furniture as should be thought necessary, at a valuation to be made on a *future day*:—Held, that this was not an absolute conveyance of a present interest in the fixtures, &c., and *semble*, that assuming the instrument to be a lease, it would have required an ad valorem as well as a lease stamp. *Id.*

ibid.

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STOCK.

See ACTION ON THE CASE, 2.

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See TROVER, 1.

A merchant in *England* sends goods of a given value to a merchant at *Quebec*, for sale on his account. Before the goods are sold, or the proceeds ascertained, the latter ships three cargoes of timber to the former, to credit in account. Two of them arrive. Against the third the consignee draws a bill for the amount, while it is in transitu. In the interval the consignee dishonours the bill, and becomes insolvent:—Held, that the consignor had a perfect right of stoppage in transitu, and was not bound to wait until the mutual accounts between him and the consignee were finally adjusted. *Wood v. Jones, M. 6 G. 4.* page 126

TENDER.

STRANDING.

See INSURANCE, 3.

SUPERFLUOUS COUNTS.

Where a declaration contains special counts for work and labour, besides the general counts, the Court will strike out the former on motion, if they are plainly unnecessary, without referring the case to the Master, though the rule is in that form; for the form of the rule is immaterial; and if the plaintiff in such a case contests the rule, the Court will make him pay the costs, though the defendant is an attorney. *Fraser v. Shaw*, M. 6 G. 4. page 383

SURETY.

Where agents had a bill account with the grantor of several annuities, for the payment of which A. became surety, and in consequence of a letter written by an attorney in the names of the grantees, at the instance of the agents, demanding payment of the arrears of the annuities, from the grantor and his surety, a sum of money was paid under circumstances, from which it was to be collected that the money was intended to be specifically appropriated to the annuity account, and the agents applied it to the bill account:---Held, that this was a misapplication, and that the money ought to be appropriated pro rata among the annuitants in relief of the surety. *Shaw v. Picton*, M. 6 G. 4. 201

TENDER.

Going with money in hand to make a tender, and demanding "whether the creditor has a receipt stamp," and receiving an answer in the negative, without an actual offer of the money, will not support a plea of tender. *Ryder v. Lord C. Townsend*, M. 6 G. 4. 119

TURNPIKE.

TRESPASS.

See BANKRUPT, 2.---EVIDENCE, 1, 2.---EXECUTION, 1.---PLEADING, 6, 13.

The relation of parent and child, though the latter lives with, and is under the control of its father, does not necessarily constitute the relation of master and servant. Therefore, where a father brought trespass for an injury to a child only two years and a half old, "*per quod servitium amisit*:"---Held, that as the child was incapable of performing acts of service, the action was not maintainable. *Sem- ble*, that the father might maintain a special action for expenses necessarily incurred by him, in having the child cured of the injury. *Hall v. Hollander*, M. 6 G. 4. page 133

TROVER.

See EVIDENCE, 7.—LIMITATIONS, STATUTE OF.—PARTNERS, 1.---WARRANT OF ATTORNEY.

1. The purchaser of goods cannot maintain *trover* for them, without paying the price; for though he acquires the right of property by the purchase, he can only acquire the right of possession by the payment: and, in order to maintain *trover*, he must have both the right of property, and the right of possession. *Bloxam v. Saunders*, M. 6 G. 4. page 396
2. The purchaser of goods sold upon credit, cannot maintain *trover* for them without paying the price; for though he acquires the right of property by the purchase, he can only acquire the right of possession by the payment: and in order to maintain *trover*, he must have both the right of property, and the right of possession. *Bloxam v. Morley*, M. 6 G. 4. 407

TURNPIKE.

1. By 3 G. 4, c. 126, s. 65, "no

trustee of any turnpike road shall have any share, or interest in, or be in any manner, directly or indirectly, concerned in any bargain or contract for making, or repairing, or in any way relating to the road for which he shall act; nor shall let out for hire any cart, or horse, for the use of any turnpike road for which he shall act as a trustee; or shall by himself, or by any other person, for or on his account, directly or indirectly, receive any money to his use or benefit, out of the tolls collected on the road for which he shall act, during the time he shall be acting as a trustee of such road: and every trustee so offending, shall for every such offence, forfeit 100*l*." By s. 143, "If the penalty exceeds 20*l*., it shall be recoverable by action of debt in any of the superior courts, and the plaintiff, if he recover in any such action, shall have full costs; provided, that there shall not be more than one recovery for the same offence, and that 21 days' notice be given to the party offending, previous to the commencement of the action; and that the same be commenced within three calendar months after the offence for which the action is brought shall have been committed." A. having contracted with the trustees of a turnpike road, to repair the road for a specific sum, B., one of the trustees, let out to A. his horse and cart for 5*s*. a day, and they were used in the repair of the road. In debt, against B. for penalties:---Held, first, that B. was liable to the penalty imposed by s. 65. Second, that the notice of action, not stating that B., when he let out his horse and cart, was acting as a trustee, was bad. And, third, that the notice being bad, the plaintiff was barred, not only of his right to costs, but of his right to sue. *Towsey v. White*, H. 6 & 7 G. 4. page 810

2. A Turnpike Act imposed tolls, 1st. on horses drawing carriages; 2nd. on carriages fixed to waggons; 3rd. on horses not drawing; and 4th. on oxen, &c.: Provided that every person having paid the toll, on producing a ticket denoting such payment, should be permitted to pass and repass, once in the same day, through the gates mentioned in such ticket, with the same horses, or other beasts, coach, or other carriages, without being liable to any additional toll. Where the same horses passed and repassed once in the same day, drawing different carriages belonging to the same person:---Held, that only one toll was payable. *Chambers v. Williams*, H. 6 & 7 G. 4. page 842
3. A Turnpike Act imposed tolls, 1st. upon carriages drawn by horses; 2nd. upon horses not drawing; 3rd. upon oxen, &c.: Provided that all persons having paid toll once for their carriages, horses, and cattle, returning the same day, with the same carriages, horses, and cattle, should pass toll free. A subsequent act recited that it was expedient to increase the existing tolls, and re-enacted the provisions of the former act, subject to some alterations; one of which was, that the former tolls should cease, and that instead thereof, there should be paid a certain toll, for every horse drawing a carriage. Four horses passed a toll-gate in the morning, drawing a carriage, and repassed the same gate in the evening, drawing a different carriage:---Held, that being the same horses, they were not liable to a second toll. *Fearnley v. Morley*, H. 6 & 7 G. 4. 832
4. A Turnpike Act imposed toll, 1st. upon every horse, &c., drawing any carriage; 2nd. upon every horse, &c., not drawing; and 3rd. upon every score of oxen, &c.: Provided that no collector should take from any person more than one toll for the

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same carriage, horses, beasts, or cattle, passing once, and repassing once in the same day, through the same, or any of the gates on the roads, such persons producing a ticket denoting that such toll had been paid on that day for such horses, beasts, or cattle. Where the same horses passed and repassed once in the same day, drawing different carriages belonging to the same person:---Held, that only one toll was payable. *Jackson v. Curwen*, H. 6 & 7 G. 4. page 838

UNDERWRITERS.

See POLICY OF INSURANCE.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 1.

VARIANCE.

See AWARD.—EVIDENCE, 4.—INSURANCE, 2.—PRACTICE, 4.

In an action on the 8 Anne, c. 14, against the sheriffs, for seizing goods without satisfying the landlord's rent, the declaration stated the writ, under which the sheriff seized, to have been sued out in K. B., and it appearing in evidence to have been sued out in C. P.:---Held, a fatal variance. *Sheldon v. Whitaker*, M. 6 G. 4. 123

VENDOR AND VENDEE.

Where a quantity of barley was sold upon a contract to "deliver alongside a sloop or warehouse at G or H., at the buyer's option, in all April, or sooner, and the barley was brought into dock at G. on the 29th April:---Held, that the contract was broken, inasmuch as it would then have taken four days to unload the vessel, and deliver the cargo into the buyer's possession. *Cox v. Todd*, M. 6 G. 4. 131

WORDS.

VENUE.

Venue is not changeable where the cause of action is the infringement of a patent. *Brunton v. White*, M. 6 G. 4. page 103

WAGER.

The stakeholder upon a cricket match between eleven players on each side at 5s. a head, is liable to the winner, if the Judge at nisi prius, in the exercise of his discretion, thinks proper to try the cause. *Walpole v. Saunders*, M. 6 G. 4. 130

WAGES.

See SEAMAN, 1.—WARRANT OF ATTORNEY.

Where there was a running account between A. and B., and the former gave the latter a warrant of attorney, with a defeazance, stating it to be given as a security for 4000l., and lawful interest thereon:---Held, that it was a continuing security, applicable to any balance which might at any time be due, and was not discharged by payments exceeding 4,000l., between the date of the warrant of attorney and the time of entering up judgment thereon. *Woolley v. Jennings*, H. 6 & 7 G. 4. 824

WAIVER.

See COVENANT, 2.

WATERMAN.

Quære, whether the rulers of the Watermen's Company of London, have jurisdiction to convict an offender against the 34 G. 3, c. 65. *Rex v. Broderip*, H. 6 & 7 G. 4. 861

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